Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

MIDWEST GENERATION, EME, LLC,

Petitioner,

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board reasonably concluded that an employer's retention of "crossover" employees (*i.e.*, employees who abandon an economic strike) during an otherwise lawful lockout does not violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3); *see also Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

2. Whether the court of appeals erred in applying an "extreme business exigency" or "defensive" standard to the retention of crossover employees during a lockout where lesser standards apply to permanent striker replacements under *Belknap, Inc. v. Hale*, 436 U.S. 491 (1983), and to temporary lockout replacements under *Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988) and *Harter Equip., Inc.*, 280 N.L.R.B. 597 (1986).

3. Whether the court of appeals exceeded its authority under Section 8(d) of the National Labor Relations Act by inviting the invalidation of an entire collective bargaining agreement. 29 U.S.C. § 158(d).

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The petitioner here, which was the intervenor in the court of appeals in support of the National Labor Relations Board's order, is Midwest Generation EME, LLC. Petitioner is wholly owned by Edison Mission Energy. Edison Mission Energy is wholly owned by Mission Energy Holding Company. Mission Energy Holding Company is wholly owned by The Mission Group. Petitioner is not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6. The respondents here are Local 15, International Brotherhood of Electrical Workers, AFL-CIO, which was the petitioner in the court of appeals, and the National Labor Relations Board, which was the respondent in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-21a, is reported as *Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 429 F.3d 651 (7th Cir. 2005). The court of appeals' decision reversed a decision and order of the National Labor Relations Board, App., *infra*, 22a-46a, reported as *Midwest Generation EME, LLC*, 343 N.L.R.B. No. 12 (Sept. 30, 2004) (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2005. App., *infra*, 1a-21a. The National Labor Relations Board's timely petition for rehearing was denied on January 4, 2006. On January 11, 2006, the court of appeals amended its January 4, 2006 order to include its denial of Midwest Generation EME, LLC's timely petition for rehearing. App., *infra*, 47a-48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case arises under the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. § 151, *et seq.* Specifically at issue are Sections 7, 8(a)(1), 8(a)(3), and 8(d) of the Act.

> Section 7 of the Act, 29 U.S.C. § 157, states in relevant part:
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 8(a) of the Act, 29 U.S.C. § 158(a), states in relevant part:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

Section 8(d) of the Act, 29 U.S.C. § 158(d), states in relevant part:

d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and

> confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession:
>
> * * * *

STATEMENT

The principal issue presented by this case is whether the National Labor Relations Board ("the Board") reasonably concluded that an employer does not violate the Act by retaining crossover employees (*i.e.*, employees who abandon an ongoing economic strike) during a subsequent bargaining lockout. In the Board's view, the post-strike retention of crossovers does not invalidate an otherwise lawful lockout instituted for the purpose of exerting economic pressure in support of bargaining demands. The Board further held that it would be anomalous to allow an employer the right to retain temporary replacements during a lockout while, at the same time, forbidding the retention of crossover employees. The court of appeals disagreed and held that the retention of crossovers, absent extreme circumstances, interferes with the right to strike and illustrates an antiunion animus. This case also presents the question of whether the court of appeals exceeded its authority, under Section 8(d) of the Act, by inviting the invalidation of an entire collective bargaining agreement.

As this Court has recognized, "virtually every" labor dispute involves crossover employees who refrain from strike activity. *See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 468 (1989). The writ of certiorari should be granted because the appropriate legal

standards for crossovers and lockouts are recurring issues that apply across industries nationwide.

A. The Facts

The facts are undisputed and set forth in a *Statement of Stipulated Facts*. Petitioner Midwest Generation EME, LLC ("the Company") and Local 15, International Brotherhood of Electrical Workers ("the Union") engaged in collective bargaining. The Company bargained in good faith throughout the entire course of negotiations. App., *infra*, 5a, 25a. Negotiations stalled nonetheless.

In response, on June 28, 2001, the Union commenced a strike involving approximately 1150 bargaining unit employees. App., *infra*, 2a, 25a. The work stoppage constituted an economic strike, as opposed to an unfair labor practice strike, at all times. The economic strike's stated purpose was to garner support for union bargaining positions and to pressure the Company to accede to Union demands.

At the strike's onset, the Company maintained operations through the use of non-bargaining unit personnel such as supervisors, contractors and temporary replacement employees. App., *infra*, 3a, 25a. The Company refrained from hiring permanent replacement employees, thereby preserving the reinstatement prospects of the strikers.

Eight (8) bargaining unit employees refused to join the strike from its inception and remained at work in the same positions they had held prior to the work stoppage. As the strike continued, fifty-three (53) other bargaining unit employees abandoned the Union's economic action. The Company accepted these employees back to their original positions without regard to their membership status in the Union, or any union. The Company did not grant "super-

seniority" or any other benefit to these employees either before or after the work stoppage.

Combined, these sixty-one (61) "crossover" employees elected to "refrain from" the protected activity of an economic strike. This decision constitutes its own form of protected activity under Section 7 of the Act. 29 U.S.C. § 157.

At the beginning of Labor Day weekend 2001, the Union extended an unconditional offer to return to work on behalf of the approximately 1100 employees who remained actively engaged in the economic strike. Despite this offer, the Union still refused to agree to the Company's lawful and legitimate contract demands. Therefore, collective bargaining remained unsettled at the time of the Union's offer.

The Company declined the Union's offer and instead instituted a lockout of striking employees. The stated and undisputed purpose of the lockout was to garner support for Company bargaining positions and to pressure the Union and striking employees to agree to Company demands.

The lockout brought closure to a protracted contract dispute. Ultimately, the Company and the Union agreed to a comprehensive collective bargaining agreement effective by its terms from October 22, 2001 to December 31, 2005. Beginning on October 22, 2001, all locked out employees were reinstated to their original pre-strike positions.

The foregoing is a recital of the proper interaction between good faith collective bargaining and the deployment of economic weapons to enforce contract demands. *See NLRB v. Ins. Agents Int'l Union, AFL-CIO*, 361 U.S. 477, 495 (1960) (Economic weapons are not a "grudging exception to some policy of completely academic discussion enjoined by the Act; [they are] part and parcel of the process of collective

bargaining."). Likewise, this Court long ago validated an employer's right to institute a lockout for the sole purpose of exerting economic pressure in support of lawful bargaining positions. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312 (1965).

B. Crossover Employees

The Company permitted crossover employees to remain at work during the lockout in the same positions they had reclaimed during the economic strike. App., *infra*, 4a, 26a. The Company notified the Union that crossovers would remain at work in the same letter that announced the decision to institute a lockout. App., *infra*, 3a, 26a. The Company's actions fully comported with Board guidance available at the time. *See Tidewater Const. Corp.*, 333 N.L.R.B. 1264, 1269 (2001) ("If the rationale underlying the allowance of a lockout is to put pressure on a union to accept the employer's bargaining demands, it would hardly serve that purpose to lock out [a crossover]. . . .").

C. Board Proceedings

In response to an unfair labor practice charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint based on a single allegation: namely, that the retention of crossovers during the lockout was "inherently destructive" of the right to strike.

The General Counsel, the Company and the Union subsequently submitted a *Statement of Stipulated Facts* and *Joint Motion to Transfer* this case directly to the Board pursuant to Section 102.50 of the Board's Rules and Regulations. Thereafter, all parties submitted briefs.

On September 30, 2005, the Board issued a Decision and Order dismissing the unfair labor practice complaint in its entirety. App., *infra*, 39a-40a. The Board based its decision on three principles that fully comport with this Court's express guidance.

First, in the context of economic warfare, an employer has a legitimate business interest in retaining employees and continuing operations. App., *infra*, 33a ("It is self-evident that the [Company's] retention of the crossover employees and nonstrikers during the lockout augmented its effort to maintain continued production."); *see also Belknap, Inc. v. Hale*, 463 U.S. 491, 504 (1983) (The motive for retaining replacement employees during economic warfare is immaterial, absent independent evidence of antiunion animus, because employees, by definition, aid the business enterprise.). This business interest is heightened when the employee in question is a member of the employer's regular workforce, as opposed to a newly-hired replacement. App., *infra*, 33a; *see also Trans World*, 489 U.S. at 437 (Crossover employees are "doubtless more experienced and therefore more needed" than newly-hired replacements.). In the Board's view, it would be anomalous to allow an employer the use of newly-hired temporary replacements during a lockout while forbidding the retention of crossovers. App., *infra*, 33a; *see also Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 768 (D.C. Cir. 1988) (use of temporary replacements during lockout does not violate the Act); *Harter Equip., Inc.*, 280 N.L.R.B. 597, 599 (1986) (same).

Second, the Board reasoned that a crossover who chooses to refrain from strike activity should not be placed in a worse position than he or she would have been had the strike not ended. App., *infra*, 33a (refusing to "visit on the crossover and nonstriking employee the consequences of the gamble taken by employees who elected to remain on strike");

see also Trans World, 489 U.S. at 438 (same). Crossovers abandoned an economic strike undertaken for the express purpose of enforcing Union bargaining demands, and instead offered to work behind a picket line. Therefore, the Board concluded that the Company's lockout reasonably drew a "lawful distinction between those employees who eschewed the strike weapon during the strike and those who stayed on strike until the end of the strike." App., *infra*, 36a n. 12.

Third, the Board stated that the use of a lockout is lawful absent evidence—independent from the lockout itself—of improper antiunion motivation. App., *infra*, 38a; *Am. Ship*, 380 U.S. at 312 (A lockout does not "fall into that category of cases arising out of [S]ection 8(a)(3) . . . in which the [Board] may truncate its inquiry into employer motivation."); *NLRB v. Brown Food Store*, 380 U.S. 278, 288 (1965) ("[T]he Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus."). In the Board's view, the Company's undisputed and stipulated good faith throughout the course of bargaining, the absence of discrimination based on union membership, and other affirmative good faith actions foreclosed any such finding. App., *infra*, 35a (quoting *Brown Food Store*, 380 U.S. at 290 ("[N]ot only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of [the Company's] good faith.")).

D. The Court of Appeals' Reversal of the Board

The court of appeals reversed the Board and held that the retention of crossovers during a lockout, absent "extreme business exigencies," violates Sections 8(a)(1) and 8(a)(3) of the Act. App., *infra*, 11a-12a. The Seventh Circuit reasoned that the retention of crossovers interferes with the right to strike as protected by Section 7. *See id.*

The court of appeals reached this result by reviewing a series of dated Board cases upholding partial lockouts implemented for "defensive" purposes as opposed to the "offensive" purpose of exerting bargaining pressure. App., *infra*, 10a-12a. The court of appeals concluded that the Company's lockout of strikers and/or retention of crossovers was not based on "defensive" objectives. App., *infra*, 12a. Failing to reconcile the Company's "offensive" desire to exert bargaining pressure with any "defensive" purpose, the Seventh Circuit concluded that an employer does not have a "legitimate and substantial" business interest in the retention of its own regular employees. App., *infra*, 8a, 12a-13a. The court of appeals then announced that crossovers may not be retained during a lockout absent "extreme business exigencies." App., *infra*, 11a-13a.

The Seventh Circuit further considered whether there is "any direct correlation between employees' non-participation in a strike and lack of support for [a union's bargaining] demands." App., *infra*, 14a. Finding none, the court of appeals rejected what it characterized as the admittedly "not . . . unreasonable" conclusion that "employees who cross a picket line have abandoned the Union's position." App., *infra*, 16a. The court of appeals further reasoned that, even if such a correlation existed, an employer could not discriminate between crossovers and strikers. App, *infra*, 16a.

Despite the Company's undisputed and stipulated good faith throughout the bargaining process, the court of appeals concluded that the Company exhibited unlawful antiunion animus. App., *infra*, 19a. The court of appeals reasoned that the "only distinction" between a crossover and a full-time striker is the extent of their participation in strike activity.

In response to the Board's argument that strikers could have ended the lockout at any time by simply agreeing to the Company's lawful contract demands, the Seventh Circuit declined to "permit inappropriate deference to employers' intent" which would validate a lockout "no matter what the terms" of an employer's offer. App., *infra*, 20a; *cf. Am. Ship*, 380 U.S. at 317 (Board holds no "general authority" to "deny weapons to one party or the other because of its assessment of that party's bargaining power.").

E. The Court of Appeals' Remedy

The Seventh Circuit concluded its opinion by instructing the Board to "consider whether [the lockout] coerced the Union and its members into ratifying [the Company's] contract offer, thereby voiding the collective bargaining agreement." App., *infra*, 21a. *Cf. Am. Ship*, 380 U.S. at 309 ("The lockout may well dissuade employees from adhering to the position which they initially adopted in bargaining. . . ."). Contrary to the court of appeals' statement, the harm claimed by the Union is not and cannot be the coercive effects of the lockout itself. *See id.* at 309, 312. Instead, for remedy purposes, the issue is whether the retention of crossovers made the lockout's coercive economic effects any more or less forceful.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Decision Undermines this Court's Decision in *Trans World Airlines v. Indep. Fed'n of Flight Attendants*.

The concept of unlawful discrimination articulated by the court of appeals is at odds with this Court's treatment of crossovers in *Trans World*, 489 U.S. at 426 (applying analogous statutory language under the Railway Labor Act

to crossovers). An employer may lawfully counteract strike and other "protected" activity through the use of a lockout or other economic means. *See Lodge 76 Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132, 152-53 (1976); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 18 (D.C. Cir. 2000); *see also Am. Ship*, 380 U.S. at 309 ("[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage."). The Board reasonably concluded that the Company was not required, given the lawful counteracting purpose of the lockout, to visit the lockout's consequences on crossover employees who had abandoned Union economic action. App., *infra*, 33a. In reaching the contrary conclusion, the court of appeals violates *Trans World's* dictates and erodes an employee's Section 7 right to refrain from concerted activity.

The court of appeals concludes that the Company's lockout "selectively" punished strikers through the retention of crossovers. App., *infra*., 17a, 19a-20a. In *Trans World*, this Court explicitly rejected the same reasoning employed by the court of appeals. 489 U.S. at 438-39. The *Trans World* employer allowed crossovers to claim desirable assignments while a strike continued. This decision had long-term consequences for full-time strikers who, even after the strike's conclusion, were not permitted to reassume positions claimed by crossovers during the strike. *Id.* at 436. Significantly, the Company's actions in this case lack any long-term effects since both the duration and impact of the lockout were limited to resolving the parties' contract dispute. App., *infra*, 30a.

In *Trans World*, this Court rejected the notion that an employer's differentiation between crossovers and strikers constitutes unlawful discrimination. Like the court of appeals in this case, the *Trans World* dissent contended that allowing

crossovers to retain positions claimed during a strike "single[s] out for penalty precisely those employees who were faithful to the strike until the end, in order to benefit those who abandoned it." 489 U.S. at 447 (Brennan, J., dissenting). This Court disagreed and refused to "penaliz[e] those who decided not to strike in order to benefit those who did." *Id.* at 438. For this reason, this Court held that the *Trans World* employer was not required to displace crossovers from their positions at the strike's conclusion. *Id.*

As the Board properly recognized in this case, the legal effect of the court of appeals' decision violates *Trans World* by "visit[ing] on the crossover and nonstriking employees the consequences of the gamble taken by the employees who elected to remain on strike, by placing them in a worse position than they would have been in if the strike had not ended." App., *infra*, 33a. One "gamble" inherent in any labor dispute is that neither a union nor an employer wields exclusive control over the timing and duration of economic action. *See Am. Ship*, 380 U.S. at 310 ("[T]here is nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages."). The Board reasonably concluded that crossovers need not be included in a lockout that merely continues an "economic battle" started by a union and strikers—a battle that crossovers refrained from in the first instance. App., *infra*, 36a-37a.

The court of appeals' decision requires an employer, absent extreme circumstances, to include crossovers in an otherwise lawful lockout lest it violate the Act. This result directly conflicts with *Trans World's* admonitions regarding the competing rights of strikers and crossovers:

> We see no reason why those employees who chose not to gamble on the success of the strike should

> suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements . . . to be displaced by more senior full-time strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk.

Trans World, 489 U.S. at 438; *accord AMI/HTI Tarzana-Encino Joint Venture, d/b/a Tarzana-Encino Reg'l Med. Ctr.*, 332 N.L.R.B. 914, 918 (2000). The consequences of employee choice should not establish an unfair labor practice by an employer.

The court of appeals also errs by applying a preference for "collective" action over an "individual" employee's Section 7 rights in a manner expressly disavowed by this Court. App., *infra*, 15a-16a ("The only distinction between [crossovers and strikers] was whether an individual worker had made his or her offer to return as part of the Union's action or individually."). The *Trans World* dissent, like the court of appeals here, contended that because "union activity, by its very nature, is group activity," crossovers and non-strikers should not enjoy a "free ride[ ]" by benefiting from a refusal to strike. 489 U.S. at 448 n.4 (Brennan, J., dissenting) (citations omitted). For this reason, the *Trans World* dissent urged that crossovers should not be permitted to retain positions claimed during a strike once full-time strikers offer to return to work. *See id.*

This Court disagreed. Because Section 7 protects both the right to engage in and refrain from protected concerted activity, the statute necessarily also protects "the benefit of [an employee's] *individual* decisions not to strike." *Trans World*, 489 U.S. at 436 (emphasis added) (citations omitted); *see also Tarzana-Encino Reg'l Med. Ctr.*, 332 N.L.R.B. at

914, (applying *Trans World's* reasoning to an economic strike and lockout under the Act). A crossover's right to refrain from concerted strike activity, in the context of economic warfare between labor and management, dictates that:

> [I]n virtually every strike situation there will be some employees who disagree with their union's decision to strike and who cannot be required to abide by that decision. It is the inevitable effect of an employer's use of the economic weapons available during a period of self-help that these differences will be exacerbated and that poststrike resentments may be created.

Trans World, 489 U.S. 436-37; *see also Pattern Makers League, AFL-CIO v. NLRB*, 724 F.2d 57, 60, (7th Cir. 1983) *aff'd*, 473 U.S. 95 (1985) (quoting *NLRB v. Granite State Joint Bhd., Textile Workers Union, Local 1029*, 409 U.S. 213, 218 (1972) (An individual employee's Section 7 rights "are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.")). Like the employer in *Trans World*, the Company here did nothing more than maintain the economic warfare *status quo* created by the strike. The Board correctly determined that this action did not constitute an unfair labor practice, and the court of appeals clearly erred in rejecting the Board's reasonable conclusion.

The writ should be granted to reestablish the Board's reasonable and proper application of this Court's decision in *Trans World* to lockouts under the Act.

2. The Court of Appeals' Decision Conflicts with the D.C. Circuit and Creates a Double Standard that Subjugates the Rights of Crossovers.

The Board held that the Company acted for the purpose of exerting economic pressure and, therefore, the lockout was lawful. App., *infra*, 39a. An employer acting for this purpose may "convert [an] economic strike into an economic lockout when the strikers ask[ ] for reinstatement." *Field Bridge Assoc.*, 306 N.L.R.B. 322, 334 (1992), *enforced*, 982 F.2d 845 (2nd Cir. 1993); *accord NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 57-59 (2nd Cir. 1999).

As a secondary justification "buttressing" the Company's proper motive, the Board also noted that the retention of crossovers aided the Company in continuing operations. App., *infra*, 32a-33a. The court of appeals, focusing on the Board's secondary rationale, concludes that an employer lacks a business justification for retaining crossovers absent "extreme business exigencies." App., *infra*, 11a-12a. The Seventh Circuit's reasoning creates a conflict among the circuits and, in addition, subjugates the rights of crossovers to those of replacement employees.

The Seventh Circuit relies on a series of Board cases recognizing an employer's right to institute a partial lockout as a "defensive" measure against "extreme business exigencies." App., *infra*, 11a-12a; *see also Bali Blinds Midwest*, 292 N.L.R.B. 243, 246-47 (1989) (partial lockout to avoid customer loss and repeated strikes); *Gen. Portland, Inc.*, 283 N.L.R.B. 826, 827 (1987) (partial lockout justified as defensive safety measure); *Laclede Gas Co.*, 187 N.L.R.B. 243, 244 (1970) (partial lockout instituted for "essentially defensive purposes"). The court of appeals then concludes that the Company did not face an "extreme business exigency" or "necessity" that would justify the retention of

crossover employees. App., *infra*, 12a-13a. The court of appeals' approach ignores the Board's stated rationale in this case—specifically, that the Company acted for the lawful purpose of exerting economic pressure. App., *infra*, 30a. Moreover, the Board's earlier validation of lockouts instituted for "defensive" purposes does not, as the court of appeals suggests, brand lockouts undertaken for "offensive" purposes unlawful.

The court of appeals' reliance on a distinction between "offensive lockouts" (*i.e.*, those instituted to support bargaining demands) and "defensive lockouts" (*i.e.*, those instituted to avoid extreme business exigencies) creates a conflict in the circuits. Indeed, this distinction has been expressly disavowed by the District of Columbia Circuit:

> [U]pon examination, the distinction between 'offensive' and 'defensive' tactics is ultimately unavailing. The Supreme Court has never adopted it, even when it reviewed Board decisions couched in those terms. . . . It is also difficult, if not impossible, as an administrative matter to discern whether an employer acts 'offensively' to exercise bargaining power, or 'defensively' to deflect the exercise of bargaining power against it. The particular objectives are but branches of the same tree, united by the employer's single root purpose of securing for itself the best possible bargain. Given the inherent artificiality of trying to separate these objectives, it would be unfortunate to make substantial consequences, such as liability under the Labor Act, turn on the labels of 'offensive' or 'defensive.'

Int'l Bhd. of Boilermakers, 858 F.2d at 768 (internal citations omitted). The writ should be granted to resolve the conflict

regarding the validity of a distinction between lockouts instituted for "defensive" versus "offensive" purposes.

Furthermore, through its reliance on the disavowed "offensive/defensive" dichotomy, the Seventh Circuit creates the very same anomalies cautioned against by this Court. *See Trans World*, 489 U.S. at 434, 438 (accepting argument that it would be completely anomalous to allow full-term strikers to displace crossovers when they may not displace newly-hired replacements). Under the court of appeals' approach, an employer embroiled in a labor dispute now has a greater right to retain replacement employees than its own, actively-working, bargaining unit employees. Thus, an employer may retain temporary replacement employees without fear of whether a lockout will subsequently be characterized as "defensive" or "offensive," yet may retain its own crossover employees only if defending against "extreme business exigencies."

An employer may retain temporary replacements during a lockout so long as their retention serves a nonfrivolous purpose and meets a "threshold test" of business justification. *See Boilermakers*, 858 F.2d at 762 (use of temporary replacements during lockout is not "inherently destructive" and, therefore, employer need only meet a "threshold test of business justification" for their use); *Harter*, 280 N.L.R.B. at 600 n.9 ("substantial" business justification does not "[mean] anything more than nonfrivolous"). An employer may secure permanent replacements "at will" and, as a practical consequence, impose long-term barriers to strikers' future employment prospects. *See Belknap*, 463 U.S. at 504 n.8; *see also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346-47 (1938).

By contrast, under the court of appeals' reasoning, a crossover may not be retained during a lockout absent a

showing of "extreme business exigency." App., *infra*, 10a-11a. The Seventh Circuit, in fact, expresses a bald preference for the use of temporary replacement employees in a lockout situation at the expense of crossovers. App., *infra*, 12a-13a. The court of appeals' view cannot be reconciled with an employer's unquestionable business interest in its own, regular employees. *See Trans World*, 489 U.S. at 437 (Crossover employees are "doubtless more experienced and therefore more needed" than replacements.); *see also The Rights of Nonstriking Employees, The Supreme Court, 1988 Term: Leading Cases: III. Federal Statutes and Regulations,* 103 HARV. L. REV. 372, 383 (1989) (predicting that *Trans World* presages a weakening of the need for a showing of economic necessity before crossovers can be promised retention).

The writ should be granted because the court of appeals' decision subjugates an entire class of employees, and creates a conflict within the circuits.

3. The Court of Appeals Erred in Rejecting the Board's Reasonable View that an Employer Has a Legitimate Business Interest in Exerting Bargaining Pressure and Counteracting Strike Activity.

The Board's decision is rooted in the principle that an employer has a legitimate interest in both exerting bargaining pressure and responding to union economic action. App., *infra*, 30a. On this basis, the Board concluded that the retention of crossovers during a lockout, absent independent evidence of antiunion animus, does not establish "discrimination based upon the Section 7 right to continue striking." App., *infra*, 35a. The Board explained:

> [I]t does not follow that the distinction [between crossovers and full-time strikers] was an unlawful

> one. For, under *Great Dane*, 'discrimination' can be lawful if there is a legitimate and substantial justification for it. In our view, there was such a justification. That justification was to place economic pressure on the Union and the employees to accept the Respondent's bargaining position. . . . The significant point is that it was no longer necessary for the Respondent to place additional pressure upon [the crossovers] to achieve its bargaining goals, for [the crossovers] had already eschewed the strike weapon during the strike.

App., *infra*, 35a-36a (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)). Employer action that reasonably serves to bring economic pressure to bear in support of lawful bargaining positions constitutes a "legitimate and substantial business purpose." *See, e.g., Harter Equip., Inc.*, 280 N.L.R.B. at 599 (characterizing the validity of this business purpose as "unassailable").

This Court has repeatedly held that the Board's rulings are "entitled to deference from the courts" if "rational and consistent" with the Act. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *see also Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). The court of appeals rejects the Board's conclusion that the Company's lockout constituted a legitimate exercise of economic pressure based on two rationales, each of which unduly intrude upon the Board's authority.

First, the Seventh Circuit concludes that allowing crossovers to work during the lockout converted this otherwise lawful economic action into a "punishment" aimed at strike activity. App., *infra*, at 19a. The essence of the court's view is that the purpose behind protected activity does not

matter, only the existence of the protected activity. *See generally,* Bernard D. Meltzer, *Single-Employer & Multi-employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 78 (1956) (premise that "any interference with protected activity or the right to strike regardless of the purpose behind such interference [constitutes] a violation of the statute . . . is plainly unacceptable."). Contrary to the court of appeals' position, an employer is well-within its rights to "counteract" strike activity through a responsive lockout. *See Lodge 76 Int'l Assoc. of Machinists & Aerospace Workers* v. *Wisconsin Emp. Relations Comm'n,* 427 U.S. at 152-53 ("[E]ven were [sic] the activity presented in the instant case 'protected' activity within the meaning of [Section] 7, economic weapons were available to counter the Union's refusal to work overtime, *e.g.*, a lockout. . . ."); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB,* 215 F.3d at 18 ("[T]hat activity may be protected does not insulate it from counteraction by an employer."); *Church Homes, Inc., d/b/a Avery Heights*, 343 N.L.R.B. No. 128, slip. op. at *7 (Dec. 16, 2004) (Table) ("[E]ven assuming . . . that the [employer's] motive was to break the union's solidarity in the economic battle, such an objective is not unlawful."). Because counteracting strike activity is a legitimate objective of a lockout, the court of appeals errs in prohibiting the retention of crossovers who were not engaged in the very strike activity a lockout may properly counteract. *See Trans World*, 489 U.S. at 442 ("[W]e should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself.").

Given an employer's established right to counteract strike activity, the court of appeals' truncated finding of antiunion motivation does not survive scrutiny. The Seventh Circuit summarily concludes that, "[b]y acting only against those who had exercised their [S]ection 7 right to strike,

[the Company] appears to have demonstrated an anti-union animus. The *only* distinction between the two groups of employees at the time of the lockout was their participation in Union activities." App., *infra*, 19a (emphasis in original). Of course, this is not the only distinction between a crossover and a full-time striker. A crossover returns to work during a period of economic warfare and blunts the effectiveness of a union's strike weapon. *See Pattern Makers' League*, 724 F.2d at 61 ("[T]he principal reason for a rule prohibiting resignations [from union membership] during strikes is to insure [sic] that union members *do not aid the company* by returning to work.") (emphasis added), *aff'd*, 473 U.S. 95 (1985). A striker, by contrast, withholds services for the express purpose of supporting union bargaining demands.

More fundamentally, an examination of other lawful economic devices exposes the flaws in the court of appeals' view. The only distinction between an economic striker and a crossover is the extent of their participation in strike activity. Yet, an employer lawfully may permanently replace the striker but holds no such right as to the crossover. *See Mackay Radio & Telegraph Co.*, 304 U.S. at 347 (employer need not discharge replacements to make room for strikers at the conclusion of a strike). The only distinction between the crossovers and full-time strikers in *Trans World* was the duration of their strike participation, but this did not render the full-time strikers immune from economic pressure. *Trans World*, 489 U.S. at 438-39.

The key consideration, as recognized by the Board, is whether an employer acts based on the proper motive of exerting economic pressure as opposed to an unlawful antiunion animus. App., *infra*, 39a ("'[P]roper analysis' of lockouts 'demands that the simple intention to support the employer's bargaining position as to compensation and the

like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.'") (quoting *Am. Ship*, *supra*, at 309); *see also Metro. Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983) ("Congress . . . did not intend to make unlawful all acts that might have the effect of discouraging union membership. Rather, the intention was to forbid only those acts that are motivated by an antiunion animus.") (internal citations omitted). In fact, the Seventh Circuit's flawed reasoning is exposed by its reliance on the relatively small number of crossover employees involved in this case.

> The claim that these eight [non-participants] and/or the last six crossovers, together representing less than 2% of the total bargaining unit, were so vital to the maintenance of business operations that it was necessary for Midwest to violate employees' [S]ection 7 rights stretches the bounds of credulity.

App., *infra*, 12a. Obviously, the number of crossovers supports the opposite conclusion.

Given the relatively small number of crossovers, one must conclude that the Company's primary motivation for the lockout was either: (a) prolonging a protracted work stoppage based on an unlawful desire to improperly "benefit" a handful of crossovers or (b) exerting economic pressure in support of its lawful bargaining demands. The latter is clearly the only reasonable conclusion. Indeed, if the Company acted based upon unlawful antiunion animus instead of a desire to exert economic pressure, there is no explanation for the reinstatement of all strikers once agreement was reached on a collective bargaining agreement. The court of appeals commits clear error in reaching the contrary conclusion.

The writ of certiorari should be granted to restore the proper analysis of lockouts under the Act.

4. The Writ Should Be Granted Because the Court of Appeals Lacks Statutory Authority for its Suggested Remedy.

The court of appeals concludes its decision with the following: "[W]e . . . remand to the Board with instructions to find that the partial lockout was an unfair labor practice. We also remand to the Board to consider whether this unfair labor practice coerced the Union and its members into ratifying [the Company's] contract offer, thereby voiding the collective bargaining agreement." App., *infra*, 21a. The court of appeals' statement is clearly contrary to the Act's dictates.

Section 8(d) does not permit the Board or the courts to intrude upon substantive aspects of the parties' collective bargaining relationship. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) (Board has no power to impose "dues checkoff proposal" absent employer agreement.); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) (The Act does not empower the Board to "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."). For this reason, the court of appeals' peculiar pronouncement ventures into wholly uncharted waters. Petitioner is aware of no case in which a court or the Board invalidated an entire collective bargaining agreement, let alone a collective bargaining agreement that has governed the relationship between a union and an employer for four years.

Just as significantly, the court of appeals' decision leaves numerous, difficult questions completely unanswered. Assuming the labor contract (which governed the parties'

relationship for nearly four years) is void, what, if anything, takes its place? Does the Company have a duty to arbitrate grievances given the contract's suspect validity? What is the status of wage increases, exercises of seniority rights and other actions taken prior to the Seventh Circuit's decision? Was the Union within its rights to accept, and the Company within its rights to deduct, dues payments under the now suspect contract? These questions are but a preview of the problems associated with the Seventh Circuit's decision.

At base, the court of appeals' statement underscores its fundamental misapprehension of the Board's reasoning. The issue is not whether a lockout has a coercive effect that pressures employees to accept bargaining demands. *See Am. Ship*, 380 U.S. at 309 ("The lockout may well dissuade employees from adhering to the position which they initially adopted in bargaining. . . ."). Instead, the issue is whether the retention of crossovers renders a lockout's coercive effects any more or less forceful, or carries with it an inherent implication of antiunion animus.

The writ should be granted because the remedy invited by the court of appeals conflicts with the Act's statutory dictates.

CONCLUSION

The decision of the Seventh Circuit presents direct conflicts with decisions of this Court and federal circuit courts on an issue of great importance to the business community and employees. The court of appeals' decision also unduly intrudes upon the Board's statutory authority to administer the Act's provisions. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 31, 2005

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1058

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

Midwest Generation, EME, LLC,

Intervenor.

Petition for Review of an Order of the
National Labor Relations Board.
No. 13-CA-39643-1

ARGUED SEPTEMBER 27, 2005—DECIDED Oct. 31, 2005.

Appendix A

Before FLAUM, *Chief Judge*, and BAUER and SYKES, *Circuit Judges.*

FLAUM, Chief Judge. Petitioner Local 15, International Brotherhood of Electrical Workers, AFL-CIO ("Union") petitions this Court for review of an order of the National Labor Relations Board ("NLRB" or "Board") finding that the Intervenor, Midwest Generation, EME, LLC ("Midwest"), did not violate sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"). 29 U.S.C. §§ 158(a)(1) and (3). Because substantial evidence did not support the Board's decision, we reverse the holding and remand to the Board to determine whether Midwest's unfair labor practices render the current collective bargaining agreement void.

I. Background

The Union began an economic strike against Midwest on June 28, 2001, over stalled negotiations for a new collective bargaining agreement. Approximately 1150 workers went on strike. Eight employees refused to strike ("non-participants"). During the course of the strike, 47 employees who were part of the Union made individual offers to return to work ("crossovers"). Midwest accepted each of these offers and reinstated the individual employees. Sixteen employees crossed the picket line in July, and thirty-one crossed between August 1 and August 30. Six additional employees made offers to return to work shortly before the strike ended on August 31. Midwest returned these last six crossovers to the workforce between September 1 and September 6. In all, a combination of sixty-one crossovers and non-participants offered to return to the workforce before the end of the strike.

Appendix A

Midwest continued to operate during the course of the strike, relying upon supervisors, contractors, and some temporary replacement employees. Midwest hired no permanent replacements. No evidence that the sixty-one non-participants and crossovers were necessary to maintain operations during the strike was submitted. Employees who returned to work were not questioned concerning their status in the Union and Midwest did not encourage or assist any employee in resigning from the Union.

On Friday, August 31, 2001, after failing to reach a collective bargaining agreement, the Union members voted to end their strike and offered to return to work unconditionally. Midwest initially gave no response to this offer, but on September 6, 2001, Midwest informed the Union that it was instituting a lockout. The Union alleges that the purpose of the six-day delay in announcing the lockout was to process the last six crossovers.

The lockout did not include those sixty-one workers who offered to return to work before the Union made its unconditional offer on August 31. Midwest locked out any employee who sought to return to work after the Union had voted to end the strike; and the lockout continued until the parties reached a collective bargaining agreement. The announced purpose of the lockout was to exert pressure upon the Union to meet Midwest's contract demands.

On October 3, 2001, the Union voted on Midwest's "final offer." The Union informed Midwest that it believed if the NLRB later found Midwest had committed an unfair labor practice during the lockout, the contract would be "void

because the Company's unfair labor practice[s] . . . coerced the employees into accepting it. Nothing the Union or its representatives say or do should be interpreted as a waiver of this position." On October 3, 2001, the Union rejected the offer. The Union sent a similar notification letter before a second vote on the same contract. On the second vote, the contract passed easily. The lockout officially ended on Monday, October 22, 2001.

Midwest informed the Union in early September that it would not allow employees who had not previously offered to return to work access to their jobs "until a new contract is agreed to and ratified[.] [E]mployees who had already returned to work, or were scheduled to return to work prior to Friday, August 31, 2001 [would] be allowed to continue to work."

Although at times all but eight of the approximately 1,150 workers were on strike, Midwest maintained normal operations throughout the strike and lockout. Midwest contends that the non-strikers and crossovers "helped the company weather the work stoppage's effects." Midwest also contends that the sixty-one employees had "abandoned an economic strike undertaken for the express purpose of supporting the Union's bargaining demands."

In response to an unfair labor practice charge filed by the Union, the General Counsel of the National Labor Relations Board issued a complaint against Midwest on March 7, 2002, for unfair labor practices in violation of NLRA sections 8(a)(1) and (3). 29 U.S.C. §§ 158(a)(1) and (3). The complaint alleged that Midwest committed an unfair

labor practice by refusing to reinstate employees who were on strike at the time of an unconditional offer to return to work, while allowing other workers who had already returned or planned to return to work access to their jobs. The parties waived an ALJ hearing and stipulated to the record. The Board issued a Decision and Order on September 30, 2004, finding that Midwest had not violated the Act. There was a dissent from the three-member board decision.

There is no evidence of bad faith by either party, nor is there any evidence that Midwest gave the crossovers or non-participants special treatment before or after the lockout.

The only issue for resolution submitted to the Board, and therefore the only issue for this Court to review, was stipulated to by the parties:

> Whether the Company violated Sections 8(a)(1) and (3) of the [National Labor Relations] Act by locking out and/or refusing to reinstate those employees who were on strike at the time of the union's unconditional offer to return to work, while not locking out and/or reinstating those individuals employed by the Company who, prior to the union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work, and had either returned to work or scheduled a return to work at the Company?

Appendix A

II. Discussion

A. Standard of Review/Method of Analysis

Board Rulings are "entitled to considerable deference so long as [they are] rational and consistent with the [National Labor Relations] Act." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990); *see also NLRB v. United Food, Commercial Workers Union, Local 23,* 484 U.S. 112, 123, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987). This Court, however, is not "obliged to stand aside and rubberstamp [its] affirmance of administrative decisions that [it] deem[s] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown,* 380 U.S. 278, 291, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965).

This complaint was brought under section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), for a violation of sections 8(a)(1) and (3) of the Act. 29 U.S.C. §§ 158(a)(1) and (3). Section 8 states that it is an unfair labor practice for an employer to interfere with employees' rights that are protected by section 7 of the NLRA, which includes the right to "engage in . . . activities for the purpose of collective bargaining." 29 U.S.C. § 157. The basic procedure to evaluate whether a company has engaged in an unfair labor practice was first outlined by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967).

The first question in the *Great Dane* framework is whether the employer's conduct is "inherently destructive

of important employee rights." 388 U.S. at 34, 87 S.Ct. 1792. Actions that harm the collective bargaining process, interfere with employees' right to strike, or are taken against employees based upon union status are "inherently destructive." *Esmark, Inc. v. NLRB,* 887 F.2d 739, 748 (7th Cir.1989). To be "inherently destructive," the effect on the collective bargaining process must be more than temporary; it must instead establish a barrier to future collective bargaining. *Id.* If an action by an employer is inherently destructive of important rights, no proof of an anti-union motivation is needed. *Great Dane,* 388 U.S. at 34, 87 S.Ct. 1792.

A harmful action by an employer that is not inherently destructive is classified as "comparatively slight." These two categories, "inherently destructive" harm and "comparatively slight" harm, make up the two prongs of the *Great Dane* framework. Under the first prong of the *Great Dane* test ("inherently destructive"), an employer's actions are submitted to a stringent test. Such actions are permissible only if after balancing business justifications against employee rights, the business justification is found to be superior. Under the second prong of the *Great Dane* test, ("comparatively slight"), an employer's actions are more likely to be justified. "[A] finding of comparatively slight harm calls for a threshold test of business justification, rather than a balancing of interests." *Int'l Bhd. of Boilermakers v. NLRB,* 858 F.2d 756, 762 n. 2 (D.C.Cir.1988). If an individual employer's actions cannot be justified under the comparatively slight harm standard, which requires a legitimate and substantial business justification, they clearly cannot be justified under the "inherently destructive" standard.

Under either prong, once it has been established that the employer's conduct negatively affects protected section 7 rights, the key question for the Board, informed by *Great Dane,* is whether the employer can state a business justification for its actions. If an employer can show no legitimate and substantial business justification, the lockout is presumptively an unfair labor practice under either prong of the *Great Dane* analysis.

Thus, the question of whether a "legitimate and substantial" business justification exists is a threshold question, properly asked prior to any decision as to whether an action is "comparatively slight" or "inherently destructive" under *Great Dane.* If a legitimate and substantial business justification is found for an employer's action, the question of whether the harm caused was "inherently destructive" or "comparatively slight" is then examined and the *Great Dane* analysis proceeds.

B. Failure to Prove a Business Justification

Apart from which *Great Dane* prong a particular case might be analyzed under:

> once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, *the burden is upon the employer to establish that he was motivated by legitimate objectives* since proof of motivation is most accessible to him.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967) (emphasis added); *see also Inland Steel Co.*, 257 N.L.R.B. 65, 68 (1981), *enforced. mem.* 681 F.2d 819 (7th Cir.1982) ("The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.").

A "legitimate and substantial" business justification must have a non-frivolous purpose. *Harter Equipment Inc.*, 280 N.L.R.B. 597, 600 n. 9 (1986); *see also Great Dane*, 388 U.S. at 38, 87 S.Ct. 1792. The issue then is whether Midwest has shown that its lockout had any business justification that was neither frivolous nor based upon an impermissible violation of section 7 rights.

The Board's majority opinion advanced two arguments in support of its finding that Midwest instituted the partial lockout for the valid purpose of "bringing economic pressure to bear in support of its legitimate bargaining position." *Midwest Generation*, 343 N.L.R.B. No. 12, 2004 WL 2235905 *3 (2004).[1] First, the Board stated that partial lockouts are legal "when justified by operational needs and without regard to union membership status." *Id.* at *4 (citing *Bali Blinds Midwest*, 292 N.L.R.B. 243, 246- 47 (1988); *Laclede Gas Co.*, 187 N.L.R.B. 243, 243-44 (1970)). Second, the Board concluded that locking out only those participating

1. There is a discrepancy between the numbering of the pages in the slip opinion produced by the Board and given to this Court by the parties and the page numbers in this opinion as available on the Westlaw service. The page numbers cited in this opinion correspond to the page numbers in the slip opinion, which is part of the record.

in the strike on August 31 was a lawful means of pressuring holdouts to abandon their bargaining position.

The dissent responded to these justifications for the partial lockout, noting:

> Notwithstanding the complete lack of supporting argument and evidence, the majority sua sponte proclaims that the Respondent's operational needs justified the partial lockout. The majority's concoction of a post hoc operational rationalization for the partial lockout does not and cannot fulfill the Respondent's obligation to proffer a legitimate and substantial business justification.

Id. at *6 (Walsh, dissenting) (citing *Inland Steel Co.*, 257 N.L.R.B. 65, 68 (1981), *enforced. mem.* 681 F.2d 819 (7th Cir.1982)).

1. Operational needs did not justify the partial lockout.

Prior to the Board's decision, Midwest offered no proof that its operational needs justified the partial lockout. Indeed, the record indicates that Midwest's operational needs were being "successfully maintained . . . through the efforts of supervisory personnel, contractors, and some temporary replacement employees." In raising the operational needs justification sua sponte, the Board cited two cases, *Bali Blinds Midwest,* 292 N.L.R.B. 243, 246-47 (1988) and *Laclede Gas Co.*, 187 N.L.R.B. 243, 243-44 (1970). These cases are not analogous to the factual situation faced by Midwest. Rather,

these cases illustrate the extreme business exigencies necessary to justify a partial lockout based upon operational needs.

In *Bali Blinds Midwest,* the employer's partial lockout was justified because it ensured that repeated work stoppages, which were legitimately feared, would not delay production and result in a loss of customers. 292 N.L.R.B. 243, 246-47 (1988). In *Laclede Gas Co.,* the Board found that the need to ensure continuing business operations and avoid public hazards justified the employer's disregard of normal seniority practices during a lockout. 187 N.L.R.B. 243, 243-44 (1970) ("[T]he temporary shutdown of the construction crew's operations was actually necessitated by the exigencies of the business operation[.] . . . [O]perating on the basis of daily contract extensions was difficult, unproductive, and potentially dangerous to the public [.] . . . [The lockout] was motivated by a desire to eliminate those operations which negotiations had rendered tentative and to protect the [employer] from overextending itself at a critical moment, all of which were essentially defensive purposes[.]") (internal quotation marks omitted). There has been no comparable allegation of exigent circumstances in the instant case.

In its brief, Midwest attempts to support the Board's operational needs justification by citing additional cases in which partial lockouts were permitted. Among those cases is *General Portland, Inc.* 283 N.L.R.B. 826 (1987). Unlike the factual situation faced by Midwest, *General Portland* illustrates an extreme situation in which operational needs justify a partial lockout. General Portland allowed employees to continue to manage enormous kilns that operate at 2700

degrees Fahrenheit and take between twelve hours and three days to shut down completely. Crossovers continually staffed these kilns in an effort to prevent "explosions, injury, and damage." *Id.* at 827. In contrast, the record is silent as to any necessity that would sanction the use of a partial lockout by Midwest.

The facts of this case further belie the operational needs justification. First, Midwest's own claims demonstrate that it successfully maintained operations throughout the strike without the use of crossover employees or non-strikers. Midwest does not argue that the lockout was based upon operational needs, but rather states its intent "to pressure [the employees] to abandon [their] demands." Second, the last six crossover employees did not even start work until after the August 31 unconditional offer to return to work, which demonstrates that these employees were unnecessary for continued operation. Third, early in the strike Midwest was able to maintain operations with only eight of the approximately 1,150 employees who were members of the bargaining unit. The claim that these eight employees and/or the last six crossovers, together representing less than 2% of the total bargaining unit, were so vital to the maintenance of business operations that it was necessary for Midwest to violate employees' section 7 rights stretches the bounds of credulity.

Every indication in the stipulated facts is that the crossovers and non-strikers were unnecessary to the continuation of business operations. Midwest and the majority opinion of the Board charge the dissent with advocating for a standard of "indispensab[ility] to continued

operations in order to be retained" during a partial *659 lockout. The dissent, however, never employs the word "indispensable." The dissent accurately notes that the "Respondent does not even argue that it needed the non-strikers and crossovers to maintain operations during the lockout." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *7 (Walsh, dissenting) (2004).

In any event, a standard less demanding than "indispensable" cannot provide employers with carte blanche to lock out employees of their choosing without regard to seniority or any other criteria. Such an approach would allow employers acting under the guise of maintaining business operations to engage in exactly the type of action Midwest undertook: punishing those who stood with the Union and rewarding those who crossed picket lines.

Demanding more than Midwest's labeling of its conduct as "necessary for business operations" does not establish strike-hiring practices that are difficult for employers to comply with. Instead, it merely avoids creating a "business operations" exception with no limiting principle, which would sanction discriminatory conduct by an employer where the employer chooses to announce its position as "necessary for business operations" without evidence supporting such a need. Simply put, to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary.

2. The partial lockout was not justified as a lawful means of economically pressuring holdouts.

Throughout the course of this litigation, Midwest contended that it allowed the non-strikers and crossovers to return to work because they "had removed themselves from the Union's economic action," making it unnecessary to pressure them into abandoning the Union's bargaining position. This allegation rests on the proposition that "working for a struck employer may, without more, be equated with abandonment of the Union's bargaining demands." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *6 (Walsh, dissenting) (2004). This assumption is fatally flawed. There can be several reasons why an employee might choose to cross a picket line. Abandonment of the Union's bargaining demands is merely one possible explanation, standing alongside individual financial motivations, personal relationships with employers, indifference, an attempt to impress management, etc. Midwest has failed to offer any direct correlation between employees' non-participation in a strike and lack of support for the Union's demands.

Midwest claims that it was unnecessary to lock out the crossovers and non-strikers because they had taken "affirmative action in derogation of the Union's bargaining position." Any business justification that relies upon workers having "removed themselves from the Union's economic action," or argues that by returning to their jobs, workers had abandoned their demands cannot carry the day in this case. When Midwest announced the selective lockout, all of the employees in the bargaining unit had removed themselves

from the economic strike by offering to return to work. The only distinction between employees was whether an individual worker had made his or her offer to return as part of the Union's action or individually.

Midwest argues that an employee who has returned to work no longer demonstrates a commitment to the Union's position. Therefore, no economic pressure against such an employee is required. What Midwest fails to note is that at the time of the lockout, all employees had offered to return to work.

There is no evidence in the record indicating why individual employees chose not to participate in the strike. It is unclear and unknown whether non-strikers and crossovers voted for or against Midwest's collective bargaining agreement proposals. The Board infers that "it was no longer necessary for the Respondent to place additional pressure upon [crossover workers and non-strikers] in order for [Midwest] to achieve its bargaining goals." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *5. This statement is without affirmation in the record of this case. Nothing has been presented to distinguish the motivation of those who offered to return to work before August 31 and those who offered to return to work after August 31. Given this absence of evidence, the Board's claim that additional pressure was necessary for one group, but not another, is unsupportable.

The Board relied upon Midwest's post hoc subjective beliefs to find that crossovers and non-strikers did not back the Union's bargaining position. In turn, Midwest relies upon

a common sense notion that employees who cross a picket line have abandoned the Union's position. While this is not an unreasonable conclusion, it is not supported by any evidence beyond mere conjecture.

The Board also justified the use of a partial lockout on the basis that "there is nothing in the law that requires an employer to use maximum economic pressure." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *5. While this statement is a truism, it does not address the relevant question before the Board. The burden remains upon the employer to prove that it had a legitimate and substantial basis for its actions. In this case, the Board appears to find sufficient any reason presented by Midwest without evidence of a "legitimate and substantial" basis for distinguishing between those employees it locked out and those it did not.

While we find no foundation for the assumption that those employees who crossed the picket line were not supporters of the Union's position, assuming arguendo that Midwest could irrefutably prove that crossovers and non-strikers had abandoned the Union's bargaining position, it still could not discriminate on this basis.

Both the NLRB and the Fifth Circuit have found that an employer "may not discriminate against certain employees merely because it anticipates that they will honor a picket line or otherwise engage in protected activity." *National Fabricators v. NLRB,* 903 F.2d 396, 400 (5th Cir.1990). An employer's discriminatory lockout on the basis of a protected activity is unlawful even when it is supportive of an employer's bargaining position.

> Lockouts are not all protected . . . . The Seventh Circuit in *Inland Trucking Co. v. N.L.R.B.*, 440 F.2d 562 (1971), affg. 179 NLRB 350, cert. denied 404 U.S. 858, 92 S.Ct. 106, 30 L.Ed.2d 100, held that an employer violated Section 8(a)(1) and (3) by locking out its employees and continuing operation with the use of new hires. The *American Ship Building* rule does not give the employer license to pick and choose among its employees and suspend those whose protected picket line activities are most damaging to it. The mere selection of such an employee from among all those in the unit for suspension is per se discriminatory.

Thrift Drug Co., 204 N.L.R.B. 41, 43 (1973).

The Board in this case appears to launch a new approach with no discernable parameters. If employers were free to exercise economic penalties selectively against those employees whom they believe economic coercion would be most effective, an employer could take discriminatory actions that have traditionally been barred. Under the Board's analysis, an employer could choose to lock out only union leaders or only employees it believes voted against a proposed contract. This type of discrimination cannot be a legitimate and substantial business justification for a partial lockout.

Not only has Midwest failed to put forth a legitimate and substantial business justification, but in its attempts to justify the partial lockout it has given further support to the Union's claim that the lockout was used in a retributive

fashion to discourage employees from exercising their section 7 right to strike.

"[T]here is an obvious disparate treatment of employees," when an employer locks out

> only those employees who, by striking, had identified themselves as union adherents, while continuing to operate with those employees who had not joined the strike[.] . . . [B]y deliberately limiting the impact of the lockout to those employees who had struck, [an employer] discriminate[s] against them for striking, and by such action violate[s] Section 8(a)(3) and (1) of the Act.

McGwier Co. v. NLRB, 204 N.L.R.B. 492, 496 (1973).

In the context of collective bargaining negotiations, nearly all employer actions are attempts to win an economic battle. Merely because retribution against strikers may be effective does not make such actions legitimate and substantial. The fact that employers have acted with the "best judgment as to the interests of their business . . . has not been deemed an absolute defense to an unfair labor practice charge." *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 229 n. 8, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963).

Based on the record presented in this appeal, there is no line that can be drawn between those employees that agreed to return to work before August 31 and those employees who agreed to return to their positions after August 31. As of the

time of the lockout, every employee had made an unconditional offer to return to work. Without a valid basis for distinction between those locked out and those allowed to work, Midwest's claim of a legitimate and substantial business justification fails.

3. Midwest displayed anti-union animus.

If Midwest's claim of no anti-union animus were to have any basis, it necessarily would contradict its earlier claim of a legitimate and substantial business justification. Either employees were locked out in a completely blind fashion, thereby offering no legitimate and substantial business justification, or they were chosen on the basis of their Union activities and therefore the action was based upon invalid anti-union motivations.

By acting only against those who had exercised their section 7 right to strike, Midwest appears to have demonstrated an anti-union animus. The *only* distinction between the two groups of employees at the time of the lockout was their participation in Union activities. Discriminating in a way that has a natural tendency to discourage participation in concerted union activities is a violation of section 8(a)(3) of the National Labor Relations Act. *See Erie Resistor Corp.*, 373 U.S. at 233, 83 S.Ct. 1139; *see also Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 39-40, 74 S.Ct. 323, 98 L.Ed. 455 (1954). As the dissent in this case succinctly stated, "The effect of the lockout's disparate treatment of employees is to undermine adherence to the Union by demonstrating to employees the advantages from the standpoint of job security

of refraining from concerted activity." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *7 (Sept. 30, 2004) (Walsh, dissenting) (citing *McGwier Co.,* 204 N.L.R.B. 492, 496 (1973); *O'Daniel Oldsmobile, Inc.,* 179 N.L.R.B. 398, 402 (1969)).

The Board argued in its brief to this Court that employees could have avoided " 'punishment' by simply agreeing to the Company's bargaining demands." Following this logic, a partial lockout would be valid provided any offer, no matter what the terms, was made to the employees. This approach would permit inappropriate deference to employers' intent in partial lockout situations.

A partial lockout is a significant measure that requires a justification beyond economic effectiveness. The fact that employees could avoid partial lockouts by agreeing to employer demands would in effect validate all partial lockouts. Undoubtedly, this would render ineffective the requirement of a legitimate and substantial business justification for discriminatory employer action and would be in derogation of nearly four decades of employee protection. *See NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967); *see also* 29 U.S.C. §§ 157, 158(a)(1), (3).

Appendix A

III. Conclusion

For the reasons set forth above, we REVERSE the findings of the Board and REMAND to the Board with instructions to find that the partial lockout was an unfair labor practice. We also REMAND to the Board to consider whether this unfair labor practice coerced the Union and its members into ratifying Midwest's contract offer, thereby voiding the collective bargaining agreement.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 30, 2004

NATIONAL LABOR RELATIONS BOARD

Case 13-CA-39643-1

MIDWEST GENERATION, EME, LLC *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 15, AFL-CIO.

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

Upon a charge filed on September 6, 2001, by International Brotherhood of Electrical Workers, Local 15, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on March 7, 2002, against Midwest Generation, EME, LLC (the Respondent), alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On May 21, 2002, the Union, the Respondent, and the General Counsel filed with the Board a joint motion to transfer this proceeding to the Board and stipulation of facts.[1]

1. The parties thereafter filed a supplement to the stipulation of facts.

They agreed that the charge, the complaint, the Order rescheduling hearing, the Order postponing hearing indefinitely, the stipulation, and the accompanying joint exhibits constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. On November 20, 2002, the Acting Executive Secretary, by direction of the Board, issued an order approving the Stipulation, and transferring the proceeding to the Board. The Union, the Respondent, and the General Counsel thereafter each filed a brief. In addition, the Respondent and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following findings of fact and conclusions of law and issues the following Order.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office located in Chicago, Illinois, and facilities located in the central and northern part of the State of Illinois, is engaged in the production and wholesale sale of electricity. The Respondent annually purchases and receives goods at its facilities which are valued in excess of $50,000 from points outside of

Illinois. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The parties have stipulated that "the only issue for resolution before the Board" is:

> Whether the [Respondent] violated Sections 8(a)(1) and (3) of the Act by locking out and/or refusing to reinstate those employees who were on [an economic] strike at the time of the union's unconditional offer to return to work, while not locking out and/or reinstating those individuals employed by the [Respondent] who, prior to the union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work, and had either returned to work or scheduled a return to work at the [Respondent]?

For the reasons set forth below, we find that the Respondent did not violate the Act by its lockout. We shall accordingly dismiss the complaint.

Appendix B

A. *Factual Background*

In June 2001,[2] the Union and the Respondent met to negotiate a successor collective-bargaining agreement following the expiration of their previous agreement. As of June 28, the parties had not reached agreement on a new collective-bargaining agreement. The parties have stipulated that throughout the course of negotiations, the Respondent and the Union met and bargained in good faith.

On June 28, the Union commenced an economic strike in support of its bargaining position. The entire bargaining unit—approximately 1150 employees—participated in the strike as of its commencement, with the exception of approximately 8 bargaining unit members who continued working (nonstrikers).

During the course of the economic strike, the Respondent maintained operations using supervisory personnel, contractors, and some temporary replacement employees. The Respondent did not use permanent replacements during the strike, or during its subsequent lockout.

Some bargaining unit employees returned to work for the Respondent during the strike. From June 28 to August 31, approximately 47 striking employees individually offered to return to work, and Respondent accepted them back (these employees are hereafter referred to as crossover employees). The parties have stipulated that the Respondent accepted these crossover employees back to work without regard to their membership status in the Union.

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2. All dates are in 2001 unless otherwise noted.

Appendix B

As of August 31, the Respondent and the Union had not reached agreement on the terms of a new collective-bargaining agreement, and were still engaged in bargaining for a new contract. By letter dated August 31, the Union notified the Respondent that it was terminating the strike, and made an unconditional offer to return to work on behalf of all strikers.

The parties held a bargaining session on September 4. The Respondent advised the Union that it was evaluating the Union's offer to return to work, and had not yet reached any decision. By letter dated September 6, the Respondent declined the Union's offer to return to work, and instituted a lockout of all those individuals on strike as of the date of the offer (August 31). The Respondent's September 6 letter notified the Union that it "will not allow striking employees to return to work until a new contract is agreed to and ratified by your membership." The letter stated that "[t]hose employees who had already returned to work,[3] or were scheduled to return to work, prior to Friday, August 31, 2001[4] will be allowed to continue to work."

Many bargaining unit employees sought to return to work after the lockout commenced. The Respondent informed them

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3. This referred to the 8 nonstrikers, and the 47 crossover employees who ceased participating in the strike from June 28 to Aug. 31.

4. This referred to six employees who the Respondent permitted to return to work between Sept. 1-5. They had ceased participating in the strike, and had scheduled with the Respondent their return to work, prior to the Union's Aug. 31 offer to return.

they could not return until a new contract was agreed to and ratified by the union membership.

Following the implementation of the lockout, the Respondent and the Union continued to meet and bargain for a new collective-bargaining agreement. On October 16, the bargaining unit ratified the Respondent's September 21 contract proposal. On October 22, the Respondent ended the lockout, and all locked out employees who opted to do so returned to work. The parties executed a collective-bargaining agreement effective from October 22 to December 31, 2005.

B. *The Parties' Contentions*

The General Counsel contends that the Respondent's partial lockout of only full-term strikers, but excluding nonstrikers and crossover employees, is unlawful under both the "comparatively slight" and "inherently destructive" tests set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The General Counsel reasons with respect to the former that the Respondent's asserted business justification for the lockout—to pressure the Union to accept the Respondent's bargaining proposals—fails to explain why the Respondent implemented a partial lockout targeting only full-term strikers. The General Counsel accordingly argues that the Respondent has failed to provide any substantial business justification for its partial lockout. The General Counsel further argues that there is "ample evidence" that Respondent acted with antiunion animus, because it targeted employees for lockout based on their Section 7 activity: it locked out only those employees who participated in the strike until its end, but did not lock out those who did not strike or who

abandoned the strike before its end. The General Counsel additionally contends that the timing of the lockout shows antiunion animus: the Respondent purposefully delayed implementing the lockout until September 6 to allow the six crossover employees who had offered to return to work before August 31 to be reinstated before the start of the lockout. It is thus asserted that Respondent timed its lockout to ensure that only "ardent" union supporters were affected.

The General Counsel alternatively argues that because the partial lockout expressly targeted only full-term strikers it was inherently destructive of employees' Section 7 rights. The General Counsel contends that the Respondent's partial lockout carried the clear message that supporting the Union will result in severe penalties: that those who participate in the strike and adhere to the Union's bargaining demands will be locked out, while those who do not will be rewarded with continued work.

The Union argues, for substantially the same reasons as the General Counsel, that the Respondent's partial lockout is unlawful under both tests set forth in Great Dane. The Union further contends, however, that the unlawful lockout coerced it to accept the Respondent's contract proposal, and the contract should therefore be set aside.

The Respondent counters that its lockout was in furtherance of securing its lawful bargaining proposals, which constitutes a settled business justification under *American Ship Building Co. v. NLRB*, 380 U.S. 300, 312 (1965). The Respondent explains that the lockout applied only to employees who were actively participating in the strike in

support of the Union's bargaining demands, in order to pressure them to abandon those demands. The Respondent asserts that the crossover employees and the nonstrikers had already "removed themselves from the Union's economic action," and pressuring them via lockout was thus unnecessary. The Respondent further argues that the partial nature of the lockout resulted not from its conduct, but from the protected choice of the nonstrikers and the crossovers not to participate in the strike. The Respondent additionally argues that there is no evidence that it acted with antiunion animus, but rather the parties have stipulated that it at all times bargained in good faith for a successor contract. The Respondent asserts that in these circumstances its lockout may not be found unlawful under either test set forth in Great Dane.

III. DISCUSSION

To determine whether the Respondent's lockout was motivated by antiunion animus in violation of Section 8(a)(3) of the Act, the Board applies the framework developed by the Supreme Court in *NLRB v. Great Dane Trailers*, *supra*, 388 U.S. at 34:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of

> the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [Emphasis in original.]

See *Central Illinois Public Service Co.*, 326 NLRB 928, 930 (1998), *rev. denied sub nom. Local 702, IBEW, AFL-CIO v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), *cert. denied* 531 U.S. 1051 (2000). The Supreme Court has held that a lockout for the "sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position" is not unlawful and is not inherently destructive of employee rights. *American Ship Building Co. v. NLRB*, *supra*, 380 U.S. at 318.

The evidence here clearly establishes that the Respondent's lockout was for the purpose of applying economic pressure in support of its legitimate bargaining proposals.[5] The Respondent expressly stated in its September 6 letter to the Union announcing the lockout that it would end as soon as "a new contract is agreed to and ratified by your membership." The Board has made clear that an employer's "assertion that it would not offer the strikers reinstatement until a new agreement was reached" is "sufficient to inform the striking employees that the employer was locking them out in support of its bargaining position." *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), *enf. denied on other grounds* 166 F.3d 55 (2d Cir. 1999). It is thus clear

5. No party argues that the Respondent's bargaining proposals were unlawful or a nonmandatory subject.

that the lockout here, brought in support of the Respondent's legitimate bargaining position, cannot be considered inherently destructive of employee rights under Great Dane. See *Central Illinois Public Service Co., supra*, 326 NLRB at 930-931.

Accordingly, we shall treat the Respondent's lockout as having a "comparatively slight" impact on employee rights and apply the second Great Dane test to determine the lockout's legality. "[I]f the action is deemed to have only a comparatively slight impact on employee rights, an affirmative showing of antiunion motivation must be made to sustain a violation under the second test of Great Dane, if the employer has first come forward with evidence of a legitimate and substantial business justification for its conduct." *Id.*, 326 NLRB at 930.

The Respondent Has Presented a Legitimate and Substantial Business Justification

The Board has explained that "[u]rging consideration and acceptance of one's bargaining proposals is clearly a legitimate bargaining position" and that "application of economic pressure in support of this bargaining position constitutes a legitimate and substantial business justification for the lockout within the meaning of Great Dane." *Central Illinois Public Service Co., supra*, 326 NLRB at 932. As discussed above, the record shows that the Respondent's lockout was brought for the purpose of bringing economic pressure to bear in support of its legitimate bargaining position. The Respondent has consistently expressed this settled business justification throughout these proceedings,

and there is no basis for concluding that this was not the real reason for its lockout.[6]

The Respondent has further justified the partial nature of its lockout. The Respondent explains that the lockout applied only to employees who were actively participating in the strike on August 31 in support of the Union's bargaining demands, in order to pressure them to abandon those demands. Neither the General Counsel, the Union, nor the dissent contend that this is an improper justification for locking out employees.

Moreover, it is settled that the Board recognizes the legality of partial lockouts when justified by operational needs and without regard to union membership status. See *Bali Blinds Midwest*, 292 NLRB 243, 246-247 (1988); *Laclede Gas Co.*, 187 NLRB 243, 243-244 (1970). We find that these considerations further buttress the lawfulness of Respondent's partial lockout.

First, there is no dispute that the partial nature of the lockout was unrelated to union affiliation; the parties have stipulated that the Respondent accepted bargaining unit employees back to work without regard to membership status in the Union. Second, there can be no dispute that the Respondent sought to effectively continue operations during the lockout, as it had while successfully weathering the strike. Of course, "there can be no more fundamental employer

6. Compare, e.g., *Black Entertainment Television*, 324 NLRB 1161 (1997) (when an employer vacillates in offering a consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted).

interest than the continuation of business operations." *Harter Equipment, supra*, 280 NLRB at 599. The Respondent lawfully used supervisory personnel, contractors, and temporary employees to maintain operations during the strike—as well as the crossovers and the nonstrikers— and continued to do so during the lockout.[7] It is self-evident that the Respondent's retention of the crossover employees and nonstrikers during the lockout augmented its effort to maintain continued production. The Respondent's retention of these employees during the lockout was fully consistent with its lawful use of temporary replacements and others to maintain operations during the lockout.

Our dissenting colleague does not and cannot dispute that the crossovers and nonstrikers lawfully aided the Respondent's maintenance of operations during the strike. Similarly, the dissent does not dispute that the Respondent lawfully could have hired temporary replacement employees for assistance in maintaining operations during the lockout. There is no support for the dissent's contention that the Respondent had to establish that the crossovers and the nonstrikers were indispensable to continued operations before it could retain them during the lockout instead of looking to less experienced temporary replacements. The effect of the dissent's position is to visit on the crossover and nonstriking employees the consequences of the gamble taken by the employees who elected to remain on strike, by placing them in a worse position than they would have been in if the strike had not ended. See *Encino-Tarzana Regional*

7. See *Harter Equipment, supra*, 280 NLRB at 600 (employer's use of temporary replacements during a lawful lockout does not violate the Act).

Medical Center, 332 NLRB 914 (2000) (employer lawfully suspended its "call off" procedure during period following strike, when replacement employees were lawfully working, where implementing it would have resulted in displacement of crossovers by more senior former strikers). This we decline to do.

The Lockout Was Not Motivated By Antiunion Animus

Notwithstanding our finding that that the lockout as implemented served a legitimate business interest, a violation of Section 8(a)(1) and (3) may still be found if the evidence warrants an inference that the Respondent's use of the lockout was motivated by antiunion animus. See *Central Illinois Public Service Co.*, 326 NLRB at 933. We have carefully searched the record and find no evidence that the lockout was motivated by antiunion animus.

The parties have stipulated that the Respondent bargained in good faith throughout the negotiations. The Respondent further fully complied with an information request made by the Union. The General Counsel does not allege any violations of the Act by the Respondent other than the partial lockout itself. With regard to the lockout, the parties have stipulated that the Respondent accepted crossover employees back to work without regard to their membership status in the Union.[8] We accordingly find this to be a case in which

8. Compare *Schenk Packing Co.*, 301 NLRB 487 (1991) (lockout unlawful where respondent announced that union members would not be hired as replacements during the lockout and unit employees would be considered for employment only if they resigned from the union).

"not only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of the [Respondent's] good faith." *NLRB v. Brown Food Store*, 380 U.S. 278, 290 (1965).[9]

Apparently recognizing that there is no evidence of discrimination based upon membership, our dissenting colleague argues that there was discrimination based upon the Section 7 right to continue striking. The argument is that the Respondent distinguished between those who did not strike or who abandoned the strike and those who remained on strike until the Union called the strike off. Concededly, the Respondent made this distinction, but it does not follow that the distinction was an unlawful one. For, under Great Dane, "discrimination" can be lawful if there is a legitimate and substantial justification for it. In our view, there was such a justification. That justification was to place economic pressure on the Union and the employees to accept the

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9. We distinguish Daily News of Los Angeles, 314 NLRB 1236, (1994), *enfd.* 73 F.3d 406 (D. C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997), cited by our colleague, where the Board found the employer's unilateral action (of withholding annual merit wage increases from employees during negotiations for an initial contract) was "inconsistent with the right to bargain collectively under Sec. 8(a)(5) and (1)" and thus not to be analyzed under Great Dane, supra. Instead, we find the situation more similar to the lockout found lawful in American Ship, supra at 310, distinguished in Daily News of Los Angeles, supra at 1243, where the purpose of the lockout was found "merely to bring about a settlement of a labor dispute on favorable terms," and thus not "inconsistent with the right to bargain collectively." As noted above, the parties have stipulated that throughout the course of negotiations, the Respondent and the Union met and bargained in good faith.

Respondent's bargaining position.[10] Concededly, the lockout was not a total one. But that does not remove the justification. The non-strikers and crossovers had decided that they did not wish to suffer the loss of pay associated with a strike. It makes no difference whether they did so because they no longer shared the Union's goals or because they simply could not afford to go without a paycheck.[11] The significant point is that it was no longer necessary for the Respondent to place additional pressure upon them in order for Respondent to achieve its bargaining goals, for these employees had already eschewed the strike weapon during the strike.[12] To be sure, the Respondent could have locked them out as well. However,

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10. As noted above, this is the business justification that the Respondent has asserted at all times since its September 6 letter to the Union notifying it of the lockout. Thus, our dissenting colleague incorrectly claims that we have "improvised" this business justification.

11. Our dissenting colleague asserts that the non-strike/crossover employees' subjective reason for working during the strike "makes all the difference." We disagree. Irrespective of their reasons, the significant point is that the Respondent considered it unnecessary to place the same pressure on them as on those who stuck with the strike until the end of the strike. And, our colleague errs when he says that the latter group eschewed the strike weapon. They stuck with it until the end of the strike.

12. On the other hand, those employees who continued to strike until the Union's unconditional offer on August 31 did not eschew the strike weapon during the strike and, therefore, it was a legitimate business justification for the Respondent to exert additional economic pressure on them in order to achieve its bargaining goals. Thus, we do not agree with our dissenting colleague that the Respondent could not make a lawful distinction between those employees who eschewed the strike weapon during the strike and those who stayed on strike until the end of the strike.

there is nothing in the law that requires an employer to use the maximum economic pressure. If the employer believes that lesser pressure will suffice, he can use that lesser pressure.[13]

At bottom, the issue here is whether the distinction made by the Respondent (nonstrikers and crossovers vs. those who stayed on strike) was for the purpose of punishing the latter or was for the purpose of winning the economic battle. We believe that the General Counsel has not shown the former.[14]

The main argument of the General Counsel and the Union is that the timing of the lockout demonstrates animus. As discussed above, they contend that the Respondent

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13. See *International Paper Co. v. NLRB*, 115 F.3d 1045, 1052 (D.C. Cir. 1997) (discussing business justification standard); *Tidewater Construction Corp.*, 333 NLRB 1264, 1269 (2001), *order vacated on other grounds sub nom. Operating Engineers Local 147 v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002), *supplemental decision on remand* 341 NLRB No. 55 (2004) (reasonable justification for employer to distinguish between crossover employee and those who were strikers and still opposed employer's contract demands when implementing lockout); *Sociedad Espanola de Auxillo de Puerto Rico*, 342 NLRB No. 40 (2004) (employer's reasonable concern for continuing operations sufficient to establish business justification); *Harter Equipment*, 280 NLRB 597, 600 fn. 9 (1986) (nonfrivolous reason sufficient), *affd. sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d. Cir. 1987).

14. Since the Respondent showed a legitimate justification for locking out the one group and not the other, the burden was on the General Counsel to show that the real motive for the distinction was to punish those who stuck with the strike.

purposefully delayed implementing the lockout from August 31 until September 6 to allow the six crossover employees who had offered to return to work before August 31 to be reinstated and processed onto the payroll before the start of the lockout. We find no meaningful evidentiary support for this contention, however. Neither the General Counsel nor the Union point to any specific evidence, and we find none in the record, establishing that the Respondent timed the commencement of the lockout because of antiunion considerations. Nothing in the record contradicts the parties' explicit stipulation that the Respondent simply advised the Union on September 4 that it "was evaluating the Union's offer to return to work" and "had not reached any decision." We cannot make a finding that the Respondent's lockout was unlawfully motivated based on nothing more than speculation.[15] There is no independent evidence that the Respondent's partial lockout was motivated by antiunion animus, and the dissent does not contend otherwise.[16]

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15. Although the Board "is permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence[,]" it "cannot rely on suspicion, surmise, implications, or plainly incredible evidence." *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir. 1996) (internal quotation omitted).

16. Compare *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 402 (1969) (partial lockout unlawful where "abundant" evidence of antiunion animus present); *ABCO Engineering Corp.*, 201 NLRB 686, 689 (1973), *enfd.* 505 F.2d 735 (8th Cir. 1974) (table) (antiunion remark by company president supported finding unlawful shutdown of plant to all employees but one nonstriker).

Appendix B

IV. CONCLUSION

The Supreme Court long ago made clear that "proper analysis" of lockouts "demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." American Ship Building Co. v. NLRB, supra, at 309. The record shows, and we conclude, that the Respondent's lockout at issue here falls firmly into the former, lawful category.

CONCLUSIONS OF LAW

1. Respondent Midwest Generation, EME, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 15, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

Appendix B

ORDER

The complaint is dismissed.

Dated, Washington, D.C., September 30, 2004

Robert J. Battista Chairman

Peter C. Schaumber Member

MEMBER WALSH, dissenting.

There can be no doubt that the Respondent's partial lockout discriminated among bargaining unit employees based on the extent of their exercise of the protected right to strike. Employees who participated in the strike for its full term were not permitted to return to work. By contrast, employees who did not participate in the strike at all (nonstrikers) and employees who initially participated in the strike but then abandoned it (crossover employees) were permitted to return to work. Because "it has been proved that the employer engaged in discriminatory conduct . . . , the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The majority acknowledges that there was "discrimination" within the meaning of Great Dane, but argues that there was a legitimate and substantial business justification for it. The record shows, however, that the Respondent has failed to provide any substantiation for its asserted business justification. Therefore, a violation of

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Section 8(a)(3) has been established under the framework set forth in *Great Dane*.[1]

The Respondent does not argue that it needed the nonstrikers and crossover employees to maintain operations during the lockout.[2] Further, there is no evidence whatsoever in the record establishing that the Respondent retained the nonstrikers and the crossover employees in order to continue operating during the lockout. To the contrary, the Respondent stipulated that during the strike that immediately preceded the lockout it "successfully" maintained operations using only "supervisory personnel, contractors and some temporary employees."

Notwithstanding the complete lack of supporting argument and evidence, the majority sua sponte proclaims that the Respondent's operational needs justified the partial lockout. The majority's concoction of a post hoc operational rationalization for the partial lockout does not and cannot fulfill the Respondent's obligation to proffer a legitimate and substantial business justification. See *Inland Steel Co.*, 257 NLRB 65, 68 (1981) ("The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions."), *enfd.* 681 F.2d 819 (7th Cir. 1982) (table).

---

1. Because the Respondent has not shown a business justification, we need not decide whether the partial lockout was "inherently destructive" of employee rights or whether the adverse effect was "comparatively slight." 388 U.S. at 33-34.

2. In two prior cases, the Board found partial lockouts to be justified by business exigencies. See *Bali Blinds Midwest*, 292 NLRB 243 (1988); *Laclede Gas Co.*, 187 NLRB 243 (1970).

I accordingly turn to the business justification that the Respondent, in fact, has advanced. The Respondent contends that it did not lockout the nonstrikers and the crossover employees because they "had removed themselves from the Union's economic action," and pressuring them to abandon the Union's bargaining demands was unnecessary. The Respondent, however, presented no evidence of any kind establishing that the nonstrikers and the crossover employees in fact abandoned the Union's bargaining position. Neither the Respondent nor the majority has cited any factual basis whatsoever substantiating the asserted business justification. See *Great Dane Trailers*, *supra*, 388 U.S. at 34 (employer must "come forward with evidence" of its business justification).[3]

Absent such required evidence, the Respondent's business justification rests only on the questionable proposition that working for a struck employer may, without more, be equated with abandonment of the Union's bargaining demands. The Board and the courts, however, have long recognized that employees may cross their union's picket line for numerous reasons. These reasons include economic concerns, an unwillingness to support the particular strike

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3. Compare, e.g., *Central Illinois Public Service Co.*, 326 NLRB 928, 931 (1998), *rev. denied sub nom. Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), *cert. denied* 531 U.S. 1051 (2000) (respondent's proffered business justification supported by "documentary evidence"); and *A.S. Abell Co. v NLRB*, 598 F.2d 876, 879 (4th Cir. 1979)("proof teeming" of respondent's business justification); with *Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 878 (D.C. Cir. 1973) (respondent failed to prove business justification where it did not introduce supporting testimony).

in progress, an unwillingness to gamble on the success of the strike, and a philosophical objection to strikes in general.[4] But the Respondent does not provide any principled basis for selecting its preferred reason. Thus, the Respondent's business justification is based on nothing more than speculation as to the motive of the crossovers and the nonstrikers.

Surprisingly, the majority claims that "[i]t makes no difference" why the crossovers and the nonstrikers acted as they did. Actually, it makes all the difference. Under Great Dane, the burden is on the Respondent to establish a business justification for the partial nature of its lockout. As discussed above, the Respondent's asserted business justification rests on the premise that, unlike the full-term strikers, the crossovers and the nonstrikers abandoned the Union's bargaining position. That premise was not proven. Therefore, the Respondent has utterly failed to substantiate its asserted business justification.[5]

---

4. See, e.g., *Pennco, Inc.*, 250 NLRB 716, 717-718 (1980), *enfd.* 684 F.2d 340 (6th Cir. 1982), *cert. denied* 459 U.S. 994 (1982); *Windham Community Memorial Hospital*, 230 NLRB 1070, 1073 (1977) ("employees who, for whatever reason, rejected the strike as a means for attaining bargaining objectives"), *enfd.* 577 F.2d 805 (2d Cir. 1978); *Allied Industrial Workers Local 289 v. NLRB*, *supra*, 476 F.2d at 881. See generally *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

5. The majority's reliance on *Tidewater Construction Corp.*, 333 NLRB 1264, 1269 (2001), *order vacated sub nom. International Union of Operating Engineers, Local 147 v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002), *supplemental decision on remand* 341 NLRB No.

(Cont'd)

Appendix B

The majority further attempts to justify the partial nature of the lockout on the basis that the crossovers and the nonstrikers had "already eschewed the strike weapon during the strike" and thus it was not necessary for the Respondent to lock them out. At the time the Respondent instituted its partial lockout, however, the entire bargaining unit had "eschewed" the strike weapon: the Union had ended the strike and made an unconditional offer to return to work.

The majority concludes that "[a]t bottom" the General Counsel has not shown that "the distinction made by the Respondent (nonstrikers and crossovers vs. those who stayed on strike) was for the purpose of punishing the latter." Under Great Dane, however, the General Counsel was not saddled with that burden. Because the General Counsel has established that the adverse effect of the Respondent's discriminatory conduct on employee rights was at least "comparatively slight," and because the Respondent has not "come forward with evidence of legitimate and substantial business justifications for the conduct," under the Great Dane framework "an antiunion motivation [need not] be proved to sustain the charge." 388 U.S. at 34.

(Cont'd)

55 (2004), is misplaced. Tidewater involved only one single crossover employee, who resigned from the union, and was not locked out. Here, none of the approximately 53 crossover employees resigned from the Union. Thus, the judge's statement in Tidewater that the lone employee was "apparently" willing to abandon the union's bargaining demands is premised on facts not present here. Further, neither the Board nor the reviewing court specifically addressed the judge's finding.

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A partial lockout distinguishing between strikers and nonstrikers has a powerful negative effect on Section 7 rights. The effect of the lockout's disparate treatment of employees is to undermine adherence to the Union by demonstrating to employees the advantages from the standpoint of job security of refraining from concerted activity. *McGwier Co.*, 204 NLRB 492, 496 (1973); *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 402 (1969). For this reason, the law requires that a partial lockout be justified by substantial business considerations.[6] As discussed above, the Respondent does not even argue that it needed the nonstrikers and the crossovers to maintain operations during the lockout. Nevertheless, the majority asserts an operational justification on the Respondent's behalf. Apparently recognizing the weakness of its position, the majority improvises a second "justification" that has nothing at all to do with continuing business operations: the majority asserts that the Respondent was privileged to discriminate against its employees for the purpose of placing economic pressure on them and the Union to accept the Respondent's bargaining position. It is well established, however, that "not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of one's bargaining position." *Daily News of Los Angeles*, 315 NLRB 1236, 1243 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997). Given the significant adverse effect of the Respondent's partial lockout on Section 7 rights, and the complete absence of any argument or evidence of an operational justification for it, the majority errs in validating

6. See *Sociedad Espanola de Auxillo de PR*, 342 NLRB No. 40 (2004) (Member Liebman dissenting) (merely articulating a plausible reason for a lockout is not enough to establish business justification).

its use by simply declaring it a permissible tactic to gain bargaining leverage.

In conclusion, the majority here has abdicated its responsibility to evaluate the Respondent's business justification. Instead, it invents its own justifications and ignores the one the Respondent has presented. By doing so, the majority has effectively negated the business justification requirement entirely. The majority's one-sided approach fails to reckon with the "ultimate problem" in determining the lawfulness of the Respondent's partial lockout: "the balancing of the conflicting legitimate interests." *NLRB v. Truck Drivers Union*, 353 U.S. 87, 96 (1957).

Dated, Washington, D.C., September 30, 2004

Dennis P. Walsh Member

National Labor Relations Board

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JANUARY 4, 2006 AMENDED JANUARY 11, 2006

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED January 11, 2006
January 4, 2006

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-1058

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

MIDWEST GENERATION, EME, LLC,

Intervenor.

Appendix C

Petition for Review of an Order of the
National Labor Relations Board

No. 13-CA-39643-1

ORDER

On consideration of the petitions for rehearing and petitions for rehearing en banc filed in the above-entitled case on December 13, 2005, by respondent, and December 15, 2005, by intervenor, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same is hereby DENIED.

FILED
JUN 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1279

IN THE

Supreme Court of the United States

MIDWEST GENERATION, EME, LLC,
Petitioner,

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE UNION RESPONDENT

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IN THE

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No. 05-1279

MIDWEST GENERATION, EME, LLC,
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v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE UNION RESPONDENT

Respondent Local 15, International Brotherhood of Electrical Workers, AFL-CIO, submits this brief in opposition to the petition for certiorari filed by Midwest Generation, EME, LLC.

STATEMENT

In its most general terms, this case concerns the question of "when it is unlawful [under the National Labor Relations Act for an employer] to discriminate in a lockout between groups of workers." *NLRB v. Local 15, Int'l Broth. of Electrical Workers, AFL-CIO*, Sup. Ct. No. 05A879, App. for an Extension of Time p. 5.

To determine the answer to this question, the National Labor Relations Board "applie[d] the [analytical] framework developed by the Supreme Court in *NLRB v. Great Dane Trailers*, [388 U.S. 26 (1967)]," to the factual situation here. Pet. App. 29a. Similarly, in reviewing and reversing the Board's decision that Midwest's "discriminat[ion] in a lockout between groups of workers" was not unlawful, the Seventh Circuit agreed that this question is to be answered by following "[t]he basic procedure . . . first outlined by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)." Pet. App. 6a.

Thus, the point of disagreement between the court below and the Board was over how the *Great Dane* framework should be applied to Midwest's discrimination in the lockout at issue here. And, the sole issue presented at this point is whether or not the court of appeals properly understood and applied this Court's teaching in *Great Dane* to the particular discriminatory lockout in this case. That issue arises in the following context.

On August 31, the Local 15 membership at Midwest Generation voted to end a two month strike against the Company and, through the Union, unconditionally offered to return to work. Pet. App. 3a. Midwest Generation did not immediately respond to the Union offer to return to work. *Ibid.* Instead, six days later, the Company informed the Union that it was locking out the employees who had struck except for those who had made individual offers to return to work prior to the strike's end. *Ibid.* Accordingly, the Company did not lock out the cohort of 61 bargaining unit employees who had made individual offers to return to work before August 31, including the six employees who had made such an offer but had not yet returned to work by that date. *Id.* at 2a. In contrast, the Company locked out the cohort of the bargaining unit employees who had stayed with the strike to its end and until the Union offered to return to work. *Id.* at 3a.

Under the *Great Dane* framework, once the Board found that Midwest's selective lockout, on its face, constituted discrimination based on union activity, the pertinent question became "whether Midwest has shown that its lockout had any business justification that was neither frivolous nor based upon an impermissible violation of section 7 rights." Pet. App. 9a.

The NLRB majority proffered two *possible* justifications for the Midwest's discrimination between those employees who made individual offers to return to work during the strike and those who made a collective offer to return through the Union at the strike's end. First, the Board majority suggested, even though not argued by Midwest, that the discrimination was "justified by operational needs." Pet. App. 32a. Second, the majority suggested that "the distinction made by the [Company] (nonstrikers and crossovers vs. those who stayed on strike)" was justified on the ground that "[t]he non-strikers and crossovers had decided that they did not wish to suffer the loss of pay associated with a strike" so that "it was no longer necessary for the [Company] to place additional pressure upon them in order for [the Company] to achieve its bargaining goals." *Id.* at 36a-37a. The court of appeals reversed the NLRB majority's conclusion in that regard on the ground that neither proffered justification had any evidentiary support in the stipulated record in this case.

With respect to the first justification, the court below held that "to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary." Pet. App. 13a. The court found that "Midwest offered no proof that its operational needs justified the partial lockout." *Id.* at 10a. In the first place, the parties had stipulated "that Midwest's operational needs were being 'successfully maintained . . . through the efforts of supervisory personnel, contractors, and some temporary replacements.'"

Ibid. quoting Statement of Stipulated Facts ¶ 18. The court also observed that "the last six crossover employees did not even start work until after the August 31 unconditional offer to return to work, which demonstrates that these employees were unnecessary for continued operations." *Ibid.*

With respect to the second justification—"that [the Company] allowed the non-strikers and crossovers to return to work because they 'had removed themselves from the Union's economic action,' making it unnecessary to pressure them into abandoning the Union's bargaining position, Pet. App. 14a"—the court concluded that "the Board's claim that additional pressure was necessary for one group, but not another, is unsupportable," *id.* at 15a. The court observed that "at the time of the lockout, all employees had offered to return to work" and that "[t]he only distinction between employees was whether an individual worker had made his or her offer to return as part of the Union's action or individually." *Ibid.* Thus, "[n]othing ha[d] been presented to distinguish the motivation of those who offered to return to work before August 31 and those who offered to return to work after August 31." *Ibid.*

The court concluded by noting that "[n]ot only has Midwest failed to put forth a legitimate and substantial business justification, but in its attempts to justify the partial lockout it has given further support to the Union's claim that the lockout was used in retributive fashion to discourage employees from exercising their section 7 right to strike." Pet. App. 17a-18a. This is so, the court explained, because Midwest was claiming the right to engage in a "discriminatory lockout on the basis of a protected activity," and such discrimination "is unlawful even when it is supportive of an employer's bargaining position." *Id.* at 16a. In this regard, the court observed, "Merely because retribution against strikers may be effective does not make such actions legitimate and substantial." *Id.* at 18a.

ARGUMENT

The Seventh Circuit's decision soundly applies the principles of this Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), to the particular discriminatory lockout situation presented here. The decision below is, moreover, precisely in line with the D.C. Circuit's more recent decision in the closely analogous case of *United Steel Workers v. NLRB*, No. 04-1435, 2006 U.S. App. LEXIS 11221 (D.C. Cir. April 28, 2006). Contrary to the assertions of the certiorari petition, the Seventh Circuit's decision is not in conflict with the decision of any other circuit nor is it in tension with any decision of this Court. The petition should therefore be denied.

1. "Under [NLRA] § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities, such as a legitimate strike." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). This Court's *Great Dane* decision elaborates on that § 8(a)(3) rule by holding that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." 388 U.S. at 34 (emphasis in original).

Following the teachings of *Great Dane*, the Seventh Circuit held that "to justify a partial lockout" that is discriminatory on its face, an employer must provide "evidence of a 'legitimate and substantial' basis for distinguishing between those employees it locked out and those it did not." Pet. App. 13a & 16a. "If an employer can show no legitimate and substantial business justification, the lockout is presumptively an unfair labor practice under . . . the *Great Dane* analysis." *Id.* at 8a. And, applying these teachings here, the court of

appeals held that because "employees were locked out . . . on the basis of their Union activities," rather than on some other, legitimate basis, the Company's "action was based upon invalid anti-union motivations" and thus was an unfair labor practice. *Id.* at 19a.

The correctness of the Seventh Circuit's understanding of *Great Dane* is confirmed by the D.C. Circuit's recent decision in the closely analogous case of *United Steel Workers v. NLRB*, No. 04-1435, 2006 U.S. App. LEXIS 11221 (D.C. Cir. April 28, 2006). In *United Steel Workers*, the D.C. Circuit reversed the NLRB's decision in *Bunting Bearings Corp.*, 343 NLRB No. 64 (2004). As the Solicitor General has explained, *Bunting Bearings* is a case in which "[t]he Board also applied its approach"—first developed in this case—"to determining when it is unlawful to discriminate in a lockout between groups of workers." *NLRB v. Local 15, Int'l Broth. of Electrical Workers, AFL-CIO*, Sup. Ct. No. 05A879, App. for an Extension of Time p. 5.

The employer in *Bunting Bearings* "selectively locked out Union member employees [and not nonmember employees] in the wake of failed negotiations over the renewal of a collective bargaining agreement." *United Steel Workers*, 2006 U.S. App. LEXIS 11221, p. *2. The Board held "that the lockout was lawful because its purpose was to 'pressure [the] union to accept [Bunting's] bargaining proposals.'" *Id.* at *3, quoting *Bunting Bearings*, 343 NLRB No. 64 at 16. The D.C. Circuit, as did the Seventh Circuit in the instant case, held that "the Board's conclusion that the lockout was lawful is inconsistent with the controlling precedent the Supreme Court set forth in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967)." *Id.* at 3-4.

The D.C. Circuit, like the Seventh Circuit in this case, read *Great Dane* as holding "that if an employer has 'engaged in discriminatory conduct which could have adversely affected employee rights to some extent,' the employer must 'establish

that he was motivated by legitimate objectives." 2006 U.S. App. LEXIS 11221, p. *4. "Accordingly," the D.C. Circuit concluded, "the burden was on Bunting to present evidence showing that the [selective] lockout was motivated by legitimate objectives." *Ibid.* Given that "Bunting did not even attempt to do this," the D.C. Circuit held that "it was not appropriate for the ALJ or the Board to speculate upon what might have motivated Bunting." *Ibid.* (quotation marks and citation omitted).

2. The D.C. Circuit's decision in *United Steel Workers* conclusively refutes Midwest's assertion that the decision below creates a conflict between the Seventh Circuit and the D.C. Circuit over the correct application of *Great Dane* in determining the legality of a discriminatory lockout. Pet. 15-18. Indeed, on analysis, there is nothing to Midwest's assertion that the earlier D.C. Circuit decisions the Company cites conflicted in principle with the Seventh Circuit's decision here. Pet. 18-22.

Those D.C. Circuit cases stand only for the proposition "that an *across-the-board lockout* 'as a means to bring economic pressure to bear in support of the employer's bargaining position,' [*American Ship Building Co. v. NLRB*,] 380 U.S. [300,] 308 [(1965)], is *categorically* not 'inherently destructive' [of NLRA-protected employee rights]." *Local 702, International Broth. of Electrical Workers v. NLRB*, 215 F.3d 11, 16 n. 1 (D.C. Cir. 2000) (first emphasis added, second emphasis in original). And, in adopting that position, the D.C. Circuit recognized that the *American Ship Building* line of "across-the-board lockout" decisions covers only those cases in which "[*a*]*ll employees are treated alike* both during and after the conflict." *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 764 (D.C. Cir. 1988) (emphasis added).

Indeed, anticipating the Seventh Circuit's decision in this case and its own later *United Steel Workers* decision, the D.C. Circuit had noted that a "lockout . . . directed . . . to specific

employees engaged in specific [protected] acts" is unlawful under NLRA § 8(a)(3), *Local 702*, 215 F.3d at 19, and had suggested that an employer may "not distinguish among the members of the bargaining unit" by conducting a selective lockout in which there is a "correlation between degree of union activity and negative consequences to union activists," *International Paper Co. v. NLRB*, 115 F.3d 1045, 1050-51 (D.C. Cir. 1997).[1]

3. While the certiorari petition does not claim that the decision below conflicts with any decision of this Court, it does suggest, in the most tentative fashion, that the decision below "undermines" and "is at odds with" *Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989)—a Railway Labor Act precedent that the Board majority did not so much as cite in its decision. Pet. 10. That suggestion is untenable.

The *TWA* case did not involve a lockout at all. The issue in *TWA* was whether the employer could honor its "assurance . . . to those who accepted employment during the strike that if they so desired their places might be permanent." 489 U.S. at 433. The Court held that the employer could honor such assurances and that, as a result, "[t]he positions occupied by newly hired replacements, employees who refused to strike,

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[1] *Accord NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 58 (2d Cir. 1999) (the generally "legitimate tactic" of locking out employees in support of bargaining demands "violates § 8(a)(1) of the Act" where the employer "discriminat[es] against its employees for exercising their right[s] under § 7"); *NLRB v. Centra, Inc.*, 954 F.2d 366, 373 (6th Cir. 1992) ("actions distinguishing among workers based on participation (or lack of participation) in a protected activity" are "inherently destructive"); *National Fabricators, Inc. v. NLRB*, 903 F.2d 396, 400 (5th Cir. 1990) (an employer "may not discriminate against certain employees merely because it anticipates that they will honor a picket line or otherwise engage in protected activity").

and employees who abandoned the strike" were "simply not 'available positions' to be filled" by returning strikers. *Id.* at 438.

Midwest has not claimed that there were not available positions for the returning strikers. Rather, the Company's position is that it was entitled to discriminate against the strikers in conducting a lockout because they stayed with the Union's strike until it ended. Thus, *TWA* has nothing whatsoever to do with this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 05-1279

In the Supreme Court of the United States

MIDWEST GENERATION, EME, LLC, PETITIONER

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an employer who locks out full-term strikers to bring economic pressure to bear in support of its lawful bargaining demands violates Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by declining to lock out employees who either did not strike, returned to work during the strike, or agreed to return to work during the strike.

2. Whether the court of appeals incorrectly drew a distinction between defensive and offensive lockouts.

3. Whether the court of appeals erred in directing the National Labor Relations Board to consider on remand whether the collective bargaining agreement should be invalidated.

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In the Supreme Court of the United States

No. 05-1279

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 429 F.3d 651. The decision and order of the National Labor Relations Board (Pet. App. 22a-46a) is reported at 343 N.L.R.B. No. 12.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2005. The petitions for rehearing were denied on January 4, 2006 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, gives employees the right to join labor organizations and to engage in other concerted activities for the purpose of collective bargaining, as well as the right to refrain from the activities. Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization."

In *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 301-302, 318 (1965), the Court held that an employer does not violate Section 8(a)(1) and (3) of the NLRA, when, after a bargaining impasse has been reached, it temporarily locks out its employees "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." In a companion case, *NLRB* v. *Brown Food Store*, 380 U.S. 278 (1965), the Court held that members of a multiemployer bargaining group lawfully responded to a whipsaw strike against one member of the group by locking out their regular employees and using temporary replacements to carry on their business. While the Court recognized that the practice of using nonunion replacements rather than union members was discriminatory, it upheld that practice because it had a "comparatively insubstantial" impact on the exercise of protected rights. *Id.* at 288.

Relying on both *American Ship* and *Brown Food*, the National Labor Relations Board (Board) held in *Harter*

Equipment, Inc., 280 N.L.R.B. 597, 600 & n.10 (1986), aff'd *sub nom. Local 825, International Union of Operating Engineers* v. *NLRB*, 829 F.2d 458 (3d Cir. 1987), that, even absent economic action by the union, an employer acts for a legitimate business reason if it locks out union-represented employees and continues its business with temporary replacements solely to persuade the union to agree to the employer's lawful contract demands. As the D.C. Circuit has recognized, the approach in *Harter Equipment* is logically compelled by *American Ship* and *Brown Food*. See *International Bhd. of Boilermakers, Local 88* v. *NLRB*, 858 F.2d 756, 759 (1988) (*Boilermakers*).

2. On June 28, 2001, International Brotherhood of Electrical Workers, Local 15, AFL-CIO (the Union), commenced an economic strike against petitioner after the parties' good faith negotiation did not produce a new collective-bargaining agreement. Pet. App. 2a. With the exception of eight bargaining unit employees who continued working (the nonstrikers), the entire bargaining unit of approximately 1150 employees went out on strike. *Ibid.* Petitioner maintained operations through the efforts of supervisory personnel, contractors, and temporary replacement employees. *Id.* at 3a. In addition to the eight nonstrikers, a total of 53 other employees (the crossovers) returned to work or offered to return to work before August 31, 2001. *Id.* at 2a.

On August 31, 2001, members of the Union voted to terminate the strike and offered to return to work. Pet. App. 3a. Petitioner declined the offer and advised the Union that it would not allow striking employees to return to work until the parties had agreed upon a new contract. *Id.* at 3a-4a. Petitioner also informed the Un-

ion that it would not lock out the 61 non-strikers and crossovers. *Ibid.* The parties ultimately agreed on a new contract, and on October 22, 2001, petitioner ended the lockout and returned the formerly locked-out employees to its active payroll. *Id.* at 4a.

3. In response to the Union's charge of an unfair labor practice, the Board's General Counsel issued an unfair labor practice complaint, alleging that petitioner's lockout of the strikers after they had made an unconditional offer to return to work violated the NLRA. Pet. App. 4a-5a. The parties jointly waived a hearing before an administrative law judge, and moved to transfer the proceeding to the Board on a stipulated record. *Id.* at 5a. The Board (by a 2-1 vote) determined that petitioner had not engaged in an unfair labor practice in violation of the NLRA and dismissed the unfair labor practice complaint. *Id.* at 22a-46a.

In evaluating the General Counsel's unfair labor practice charge, the Board applied the framework set forth in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legiti-

> mate and substantial business justifications for the conduct.

Id. at 34 (quoting *Brown Food*, 380 U.S. at 289).

The Board observed that in *American Ship* this Court held "that a lockout for the 'sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position' is not unlawful and is not inherently destructive of employee rights." Pet. App. 30a (quoting *American Ship*, 380 U.S. at 318). Based on its assessment of the relevant evidence, the Board found that petitioner's lockout was for the purpose of bringing economic pressure to bear in support of its legitimate bargaining position. *Ibid.* The Board therefore concluded that the lockout was not "inherently destructive" of employee rights, but instead had a "comparatively slight" impact on such rights, requiring petitioner to produce a "legitimate and substantial business justification for its conduct." *Id.* at 31a (citation omitted).

The Board determined that petitioner had established such a legitimate and substantial justification for its conduct. Pet. App. 31a-34a. In particular, the Board concluded that petitioner reasonably extended the lockout to strikers, but not to non-strikers and crossovers, in order to pressure employees to abandon the Union's bargaining demands. *Id.* at 32a. The Board emphasized that it made "no difference" whether the non-strikers and crossovers abandoned the strike "because they no longer shared the Union's goals or because they simply could not afford to go without a paycheck." *Id.* at 36a. What mattered, the Board concluded, was that "it was no longer necessary for [petitioner] to place additional

pressure on [the non-strikers and crossovers] in order for [petitioner] to achieve its bargaining goals, for those employees had already eschewed the strike weapon during the strike." *Ibid.* The Board buttressed its conclusion with the observation that it was "self-evident that the [petitioner's] retention of the crossover[s] * * * and nonstrikers during the lockout augmented its effort to maintain continued production." *Id.* at 33a. While the Board recognized that employers are free to lock out all employees, including nonstrikers and crossovers, it held that employers are under no legal obligation to do so when they conclude that lesser pressure will suffice. *Id.* at 36a-37a.

4. On the Union's petition for review, the court of appeals reversed. Pet. App. 1a-21a. The court held that petitioner violated the NLRA by locking out full-term strikers, while not locking out non-strikers and crossovers. *Id.* at 5a, 21a.

The court began by observing that, under either the "inherently destructive" prong or the "comparatively slight" prong of *Great Dane*, the threshold issue is whether the employer can state a non-frivolous business justification for its action. Pet. App. 8a-9a. The court examined two potential justifications for petitioner's partial lockout: operational needs and pressuring holdouts to abandon their bargaining position. *Id.* at 9a-10a. The court concluded that petitioner had "offered no proof that its operational needs justified the partial lockout." *Id.* at 10a.

The court also rejected as inadequate petitioner's claim that "it allowed the non-strikers and crossovers to return to work because they 'had removed themselves from the Union's economic action,' making it unneces-

sary to pressure them into abandoning the Union's bargaining position." Pet. App. 14a (quoting *id.* at 29a). The court determined that petitioner's justification rested on an unsupported assumption that the non-strikers and crossovers had abandoned the Union's bargaining position. *Id.* at 15a-16a. The court found "no evidence in the record indicating why individual employees chose not to participate in the strike," or "to distinguish the motivation of those who offered to return to work before August 31 and those who offered to return to work after August 31." *Id.* at 15a.

The court held that, even if it were shown that nonstrikers and crossovers had abandoned the Union's bargaining position, petitioner could not discriminate between those employees and the full-term strikers. Pet. App. 16a-20a. The court stated that "[a]n employer's discriminatory lockout on the basis of a protected activity is unlawful even when it is supportive of an employer's bargaining position." *Id.* at 16a. The court viewed that principle as applicable because it determined that "[a]s of the time of the lockout, every employee had made an unconditional offer to return to work" and "[t]he *only* distinction between the two groups * * * was their participation in Union activities." *Id.* at 18a-19a. Having found that the partial lockout was unlawful, the court remanded the case to the Board to consider whether the partial lockout "coerced the Union and its members into ratifying [petitioner's] contract offer, thereby voiding the collective bargaining agreement." *Id.* at 21a.

ARGUMENT

1. Petitioner seeks review (Pet. 10-14) of the court of appeals' holding that a lockout that is designed to put

pressure on a union to accede to the employer's legitimate bargaining demands violates the NLRA, when the lockout applies to strikers, but not to non-strikers and crossovers. A majority of the Board agrees with petitioner that the court of appeals erred in holding that petitioner acted unlawfully. Review of the court's decision is not warranted, however, because the decision does not directly conflict with any decision of this Court, there is no conflict in the circuits, and the question has not arisen with sufficient frequency to warrant review in the absence of a conflict.

a. The court of appeals in this case held that petitioner's lockout was unlawful because it discriminated between employees who were involved in the protected activity of striking and those who were not. Pet. App. 16a. The court apparently viewed such a distinction as per se impermissible under the NLRA, even when it reflects an employer's reasonable business judgment concerning the amount of pressure necessary to persuade a union to accede to its legitimate bargaining demands. *Id.* at 16a-19a.

A majority of the Board agrees with petitioner that the court of appeals erred in reaching that conclusion. As the Board explained in its decision, under *American Ship*, a lockout that is designed to pressure a union into acceding to an employer's legitimate bargaining demands is a legitimate economic weapon, and an employer's use of that legitimate tool is not transformed into a violation of the NLRA simply because the employer permits non-strikers and crossovers to continue to work. Pet. App. 30a, 35a-37a.

The Board also agrees with petitioner that the Court's decision in *TWA* v. *Independent Federation of*

Flight Attendants, 489 U.S. 426 (1989), provides support for the Board's decision. In *TWA*, the Court held that an employer did not act unlawfully under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, when, at the end of a strike, it refused to displace crossovers who worked during the strike in order to reinstate striking employees with greater seniority. The Court reasoned that the RLA protects the right not to strike as well as the right to strike, *TWA*, 489 U.S. at 436, and that the Act therefore did not require an employer to "penalize[] those who decided not to strike in order to benefit those who did," *id.* at 438. The Court saw "no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful." *Ibid.*

Under the court of appeals' ruling, an employer that engages in a legitimate lockout of strikers may be required to extend the lockout to crossovers as well. The effect of such a policy, however, would be to penalize employees who exercised their right not to strike and to require employees who chose not to gamble on the success of the strike to suffer the consequences of the strikers' unsuccessful gamble. The Board's conclusion that the NLRA does not require that result (Pet. App. 33a-34a) is fully consistent with *TWA*.

b. While the court of appeals erred in its ruling, review is not warranted. Three considerations support that conclusion.

First, there is no direct conflict between the decision below and any decision of this Court. As discussed above, *TWA* provides support for the Board's decision. Contrary to petitioner's contention, however, *TWA* does not squarely conflict with the decision below. The hold-

ing of *TWA* is that an employer is not required to displace crossovers who worked during the strike in order to reinstate striking employees with greater seniority. The decision below does not require an employer to displace crossovers from their jobs and give their jobs to full-time strikers. Instead, it prohibits an employer from locking out strikers, but not crossovers, when members of both groups have made offers to return to work, and when, in the court's view, the sole proffered justification for permitting only crossovers to work is the assumption that they have abandoned the union's bargaining position. Thus, *TWA* does not directly control the question presented in this case.[1]

Second, the decision below does not conflict with any decision of another court of appeals. Indeed, this is the first court of appeals to address the question whether a lockout of full-term strikers in order to pressure a Union to accede to the employer's lawful bargaining demands is unlawful because the lockout does not apply to non-strikers and crossovers.

Third, the question presented has not arisen with sufficient frequency to warrant the Court's review in the absence of a clearly developed circuit conflict. In the 40

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[1] In *TWA*, moreover, the employer, as an "incentive for individual strikers to return to work," 489 U.S. at 437, promised crossovers that they would retain the desirable position they obtained during the strike, even after more senior employees returned to work. The Court held that the employer's promised inducement to crossovers was "fairly within the arsenal of economic weapons available to employers during a period of self-help." *Id.* at 438. The Board made no findings of analogous promises to crossovers in this case (such as a promise that they would retain their jobs in the event of a lockout), and accordingly the court of appeals did not express any view on the validity of an employer's decision to honor such promises in the event of a lockout.

years since *American Ship* and *Brown Food* upheld employer lockouts as a legitimate economic weapon, the legality of an employer's retention of crossover employees during an otherwise lawful bargaining lockout has arisen only rarely. Review of petitioner's first question is therefore not warranted.

2. Petitioner next contends (Pet. 16-17) that the court of appeals relied on a distinction between defensive lockouts and offensive lockouts, and that its decision therefore conflicts with the D.C. Circuit's statement in *Boilermakers* that a distinction between offensive and defensive lockouts is unworkable. See 858 F.2d at 768. That contention is based on a mischaracterization of the court of appeals' decision. Nowhere in its opinion did the court of appeals use the terms "offensive" or "defensive." Nor did it say anything else to suggest that its decision turned on such a distinction. There is therefore no conflict between the decision below and the statement in *Boilermakers* that the lawfulness of a lockout does not depend on whether it is offensive or defensive.

In any event, the actual holding of *Boilermakers* is that an employer does not violate the NLRA by locking out the entire unit and continuing to operate with temporary replacements to pressure its employees' union to accept the employer's bargaining demands. 858 F.2d at 764, 769. *Boilermakers* did not involve a partial lockout of only full-term strikers, and, accordingly, that decision does not address the partial lockout issue presented in this case.

Petitioner contends (Pet. 17) that the court of appeals improperly limited the circumstances in which a lockout could be justified to "extreme business exigencies." But the court referred to extreme business exi-

gencies only in connection with its discussion of when a partial lockout could be justified by "operational needs." Pet. App. 11a. The court did not state that justifications other than operational needs would be subject to an "extreme business exigencies" test.

Indeed, it is not even clear that the court of appeals adopted "extreme business exigencies" as the test for determining when a partial lockout is justified by operational needs. While the court stated that certain Board cases "illustrate the extreme business exigencies necessary to justify a partial lockout based upon operational needs," Pet. App. 11a, the court also stated that "to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary." *Id.* at 13a.

Whatever the court of appeals' view of the appropriate standard for determining when a lockout is justified by operational needs, however, it does not provide a basis for granting review in this case. Petitioner has not argued that its partial lockout is justified by operational needs. And, as the court of appeals explained, petitioner did not introduce any evidence that would support an operational needs justification. Accordingly, this case does not present the question of what standard should apply when an employer seeks to justify a partial lockout based on operational needs.

3. Finally, petitioner contends (Pet. 23-24) that the court of appeals erred in directing the Board to consider whether petitioner's unlawful lockout coerced employees into ratifying the collective bargaining agreement, thereby invalidating the agreement. That contention does not warrant review.

Petitioner argues (Pet. 23-24) that, under *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 102 (1970), the Board lacks authority to invalidate a collective-bargaining agreement. In *H.K. Porter*, however, the Court held only that the Board is "without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." *Ibid.* *H.K. Porter* did not address the question whether the Board has authority to invalidate a collective bargaining agreement that has been secured through coercion.

In any event, review of that question at this stage would be premature. On remand, the Board may decide not to invalidate the collective bargaining agreement. Moreover, if the Board voids the agreement, petitioner could seek review of that order before an appropriate court of appeals (see 29 U.S.C. 160(f)), and ultimately this Court. See generally *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Supreme Court has the authority to consider questions determined in earlier stages of the litigation when certiorari is sought from the most recent judgment of the court of appeals); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). Because petitioner's collective bargaining agreement may never be invalidated, and because petitioner would have an opportunity to seek review at a later stage if it is invalidated, there is no reason to review that issue now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

Respondent National Labor Relations Board ("the Board") provides no persuasive or principled reason for this Court to leave unreviewed the Seventh Circuit's holding that an employer must include crossover employees (*i.e.*, employees who abandon an ongoing economic strike) in a lawful bargaining lockout. As explained in Petitioner Midwest Generation's petition for a writ of certiorari, the court of appeals' decision conflicts with the National Labor Relations Act's dual protection of employee rights. 29 U.S.C. § 157 (employees have equally protected rights to either "engage in" or "refrain from" protected activity). The competing choices provided to employees under Section 7, and the benefits and consequences which derive from each, stand at the very heart of national labor policy. It is difficult to fathom a more compelling Section 7 question than the one presented by this case. Further, the court of appeals' decision simply cannot be reconciled with this Court's previous admonitions regarding the rights of crossover employees. *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989); Bd. Brf. at 8-9.

The Board does not seriously dispute any of these points. Instead, the Board, by implication, acknowledges that the court of appeals' ruling is "inconsistent" with *Trans World*. Bd. Brf. at 9 (noting that the court of appeals reversed a Board decision that was "fully consistent" with *Trans World*). The Board further concedes that the court of appeals' decision improperly requires employers to impose economic consequences on the very same employees who "refrained from" economic activity in the first instance. Bd. Brf. at 9 ("The effect of [the court of appeals' ruling] would be to penalize employees who exercised their right not to strike and to require employees who chose not to gamble on the success of the strike to suffer the consequences of the strikers' unsuccessful gamble."); *Trans World*, 489 U.S. at 438 (declining to "visit the consequences of the lost [strike] gamble on those who refused to take the risk"). Put simply, the Board's submission "opposes" Midwest Generation's petition in name only.

Nevertheless, Respondents essentially advance two arguments in opposition. The Board equivocally argues that the court of appeals' ruling and this Court's admonitions in *Trans World* do not "squarely conflict." Bd. Brf. at 9. Respondent Union, in turn, relies upon an unpublished decision of the D.C. Circuit in an attempt to bolster the court of appeals' clearly erroneous holding. Neither Respondent succeeds in articulating a reasonable basis for denying certiorari in this case.

1. The Act does not compel either labor or management to make concessions during the course of collective bargaining. 29 U.S.C. § 158(d). Put bluntly, the potential and actual use of economic weapons constitutes the primary tangible force pushing two adversarial parties towards agreement. *See NLRB v. Ins. Agents Int'l Union, AFL-CIO*, 361 U.S. 477, 495 (1960) (economic weapons are "part and parcel" of the collective bargaining process). For this reason, an employer may "convert [an] economic strike into an economic lockout when the strikers ask for reinstatement." *Field Bridge Assoc.*, 306 N.L.R.B. 322, 334 (1992), *enforced*, 982 F.2d 845 (2nd Cir. 1993). A lockout therefore constitutes a lawful "counteraction" to strike activity. *See Lodge 76 Int'l Assoc. of Machinists and Aerospace Workers v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132, 152-3 (1976); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 18 (D.C. Cir. 2000). The fundamental question presented by this case is whether an employer who exercises these established rights must lockout crossover employees who (a) have already "refrained from" the very strike activity a lockout is designed to counteract; and (b) have already returned (or offered to return) to work during the strike.

As the Board concedes, this Court's decision in *Trans World* compels the conclusion that crossovers should not be displaced from their jobs simply because the strike they refrained from prompts a counteracting lockout. *See* Bd. Brf. at 8-9. Section 7 protects both the right to "engage in" and "refrain from" strike activity in equal measure. 29 U.S.C. § 157. The effect of the court of appeals' decision is to elevate one right (the right to

engage in economic or strike activity) over its counterpart (the right to refrain from such activity). There is no statutory basis for this conclusion.

Indeed, as the Board acknowledges, the court of appeals' decision undoubtedly "penalize[s] employees who exercised their right not to strike and . . . require[s] employees who chose not to gamble on the success of the strike to suffer the consequences of the strike's unsuccessful gamble." Bd. Brf. at 9. This result is, in fact, squarely and fully in conflict with *Trans World's* dictates:

> We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements . . . to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk.

Trans World, 489 U.S. at 438; *accord AMI/HTI Tarzana-Encino Joint Venture, d/b/a Tarzana-Encino Reg'l Med. Ctr.*, 332 N.L.R.B. 914, 918 (2000). The court of appeals' decision simply cannot be reconciled with this Court's view of Section 7 rights as set forth in *Trans World* and, therefore, the petition should be granted.

Finally, contrary to the Board's position, the competing rights of crossovers and strikers are legitimate, fundamental and recurring issues in nearly every labor dispute nationwide. This Court, in fact, has stated that "virtually every" labor dispute involves crossover employees who refrain from strike activity. *See Trans World*, 489 U.S. at 436-7. The Board's assertion that issues relating to crossover employees do not arise with "sufficient frequency" to merit review fails in light of this Court's own statements and industrial realities. Review of the court of appeals' erroneous ruling on this recurring and significant issue, therefore, is clearly warranted. Bd. Brf. at 8 ("A majority of the

Board agrees with petitioner that the court of appeals erred in [holding that petitioner acted unlawfully].").

2. Respondent Union's submission actually underscores the glaring shortcomings contained in the court of appeals' decision. The Union relies almost exclusively on the D.C. Circuit's recent decision in *United Steel Workers v. NLRB*, No. 04-1435, 2006 U.S. App. LEXIS 11221 (D.C. Cir. Apr. 28, 2006), *rev'd sub nom. Bunting Bearings Corp.*, 343 N.L.R.B. No. 64 (2004). In that case, the D.C. Circuit invalidated a lockout instituted along union membership lines. As the D.C. Circuit explained, "no authority holds that [the Union] must initially do more than what [it] has done here: show a (perfect) correlation between union membership and which employees were locked out." *Id.* at *4 (quoting *Bunting Bearings Corp.*, 343 N.L.R.B. No. 64 at 8 (Liebman, dissenting).

Unlike *United Steel Workers*, this case is completely devoid of any allegation or evidence that Petitioner discriminated along union membership lines. As noted in both the Board and the court of appeals' decisions, the *Statement of Stipulated Facts* in this case states: "The Company accepted bargaining unit employees back to work *without regard to membership* status in the Union, or any union." Pet. App. at 3a, 25a (emphasis added). Because union membership played no role in Petitioner's actions, Respondent Union's reliance on *United Steel Workers* is wholly misplaced.

In fact, there is no evidence or even suggestion that Petitioner displayed any antiunion animus. Pet. 19-22. The linchpin of the court of appeals' decision is its conclusion that the lockout itself may serve as the basis for an unfair labor practice finding. Pet. App. at 19a; *see also NLRB v. Brown Food Store*, 380 U.S. 278, 288 (1965) ("[T]he Board must find from evidence independent of the mere conduct involved that the conduct was *primarily motivated* by an antiunion animus.") (emphasis added). Absent this erroneous legal conclusion, neither the court of appeals nor either Respondent suggests that Midwest Generation's actions were motivated by antiunion animus.

Without such evidence, the court of appeals clearly erred by invalidating the lockout. As established by this Court and as recognized by the Board, the key consideration in any lockout scenario is whether an employer acts based upon the proper motive of exerting economic pressure as opposed to an unlawful antiunion animus. Pet. App. at 39a ("proper analysis" of lockouts "demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful") (quoting *Am. Ship*, supra, at 309); *see also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983) ("Congress . . . did not intend to make unlawful all acts that might have the effect of discouraging union membership. Rather, the intention was to forbid only those acts motivated by an antiunion animus") (internal citations omitted). Petitioner's undisputed good faith throughout collective bargaining and its overall course of conduct conclusively establish that the lockout was instituted for the legitimate objective of exerting economic pressure in support of lawful bargaining demands. Given this motivation, the court of appeals committed clear error in overturning the Board's decision.

Put simply, the question here is whether Petitioner locked out some 1100 employees for the lawful purpose of bringing closure to a prolonged contract dispute or for unlawful reasons unrelated to negotiations. Petitioner's reinstatement of every single striker once negotiations ended conclusively proves that Petitioner acted for lawful purposes. The court of appeals commits clear error in reaching the opposite conclusion.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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